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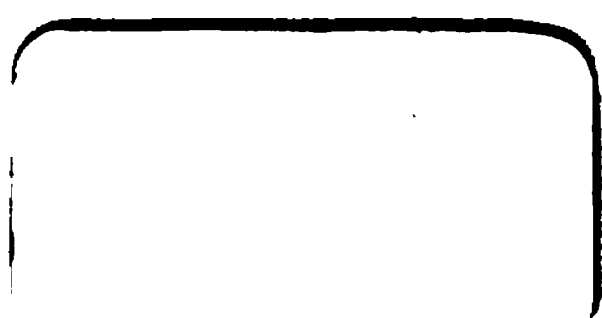
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

VOL. XXXI.

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* Became chief justice at June term, 1878.

† Brees, J., died June 27, 1878, and on the 9th of July, 1878, Hon. David J. Baker was appointed to fill the unexpired term ending in June, 1879.

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* Simrall, C. J., term expired May 9, 1879, and he was succeeded by Hon. J. Z. George.

† Appointed June 10, 1878, vice William F. Allen, deceased.

‡ Elected Nov. 5, 1878, vice William F. Allen, deceased.

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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

SIMPSON V. STATE.

(59 Ala. 1.)

Criminal law — assault with intent to murder — spring-guns.

It is unlawful for the occupant of lands to set spring-guns or other mischievous weapons on his premises, and if the same cause death to any trespasser it is a criminal homicide. But to authorize a conviction of assault with intent to commit a murder, a specific felonious intent must be proved; and so, where one plants such weapons with the general intent to kill trespassers and wounds a particular person, he cannot be convicted of assault with intent to commit murder. The intent to kill that particular person alone must be shown, and cannot be implied from the general conduct.*

CONVICTION of assault with intent to commit murder. The evidence tended to show that the complainant, who occupied lands adjoining the defendant's, was wounded by a spring-gun which the defendant had long been in the habit of maintaining against trespassers who had injured his property. There was also evidence of enmity between the complainant and defendant. The substance of the instructions complained of is sufficiently set forth in the eighth paragraph of the opinion.

Arrington & Graham, and *Rice, Jones & Wiley*, for appellant. Setting a spring-gun under the circumstances disclosed by the bill of exceptions, is lawful. 3 Stew. 481; 7 Marsh (Ky.) 478; 1 Esp.

* See *Hariston v. State*, 54 Miss. 689; 28 Am. Rep. 392; *Garnet v. State*, 1 Tex. Ct. App. 605; 28 Am. Rep. 425, and note, 428.

203; 3 Barn. & Ald. 304; Sher. & Redf. on Neg. § 509. The language of the statute—7 and 8 of George IV., “whereas, it is expedient to prohibit the setting of spring-guns,” etc., shows it was lawful at common law. There is no statute on the subject in Alabama. If anything more was needed, it is sufficient to say that while the practice of setting spring-guns has prevailed since guns came into use in the fourteenth century, not a case can be found in the reports of England or America where any one has been prosecuted for shooting another with a spring-gun.

Bragg & Thorington, for the Attorney-General, *contra*.

BRICKELL, C. J. The indictment contains a single count, charging, in the prescribed form, the defendant with an assault with intent to murder one Michael Ford. It is founded on the statute (Rev. Code, § 3670), which reads as follows: “Any person who commits an assault on another, with intent to murder, maim, rob, ravish, or commit the crime against nature, or who attempts to poison any human being, or to commit murder by any means not amounting to an assault, must, on conviction, be punished by imprisonment in the penitentiary, or hard labor for the county, for not less than two or more than twenty years.” It is apparent the statute was intended for the punishment of several distinct offenses, the elements of each being an act done, which of itself, though it may be an indictable offense, is aggravated by the intent attending it, and the higher offense contemplated. Each was an offense known to the common law, indictable and punishable as a misdemeanor. We do not mean, of course, that each was at common law recognized as a separate, distinct, technical offense. An assault was a misdemeanor; if attended with a felonious intent, the intent was a matter of aggravation, justifying the imposition of severer punishment—not other or additional punishment—than that inflicted on misdemeanors, but severer in degree. *Beasley v. State*, 18 Ala. 534; *Meredith v. State*, in manuscript; 2 Whart. Cr. Law, § 1287; 2 Arch. Cr. Pl. 285, note. And so at common law, an attempt to poison, or by any means to commit murder, or to commit any felony, in itself is a misdemeanor. 8 Whart. Cr. Law, § 2696. We repeat, the statute provides for the punishment of several distinct offenses, known to the common law. It does not declare the constituents of either offense; it is silent as to the facts which must concur, to constitute the felonious assault,

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or the felonious attempt. These must be ascertained from the common law, and if the statute had not prescribed the forms of indictments, or declared the averments it is necessary to make, the offense must have been described as at common law—the facts constituting the assault or attempt must have been stated and connected with an averment of the felonious intent or design. *Beasley v. State, supra*. Though indictments are abridged in form, and reduced to a statement rather of legal conclusions than of the facts which support, or from which the conclusions may be drawn, the nature of offenses is not changed, and the conclusion stated must be sustained by the same measure of evidence which would be necessary if the facts on which it depends were stated. It is the assertion of a mere truism to say, that if an indictment charges one of these offenses, it cannot be supported by evidence of another. As in the present case, the charge of an assault with intent to murder is not supported by evidence of an assault with intent to maim, or to commit either of the other designated felonies. Nor yet, would it be supported by evidence of an attempt to poison, or to commit murder, by means not amounting to an assault. The offense charged must be proved, and an essential element of the present offense is not only an assault with intent to murder, but the specific intent to murder Ford, the person named in the indictment. If the intent was to murder another, or if there was not the specific intent to murder Ford, there cannot be a conviction of the aggravated offense charged, though there may be of the minor offense of assault, or of assault and battery. *Barnes v. State*, 49 Miss. 17; *Jones v. State*, 11 Sm. & Mar. 315; *Ogletree v. State*, 28 Ala. 693; *Morgan v. State*, 33 id. 413; *State v. Abram*, 10 id. 928.

The intent cannot be implied as matter of law; it must be proved as matter of fact, and its existence the jury must determine from all the facts and circumstances in evidence. It is true the aggravated offense with which the defendant is charged cannot exist, unless if death had resulted, the completed offense would have been murder. From this, it does not necessarily follow, that every assault from which if death ensued, the offense would be murder, is an assault with intent to murder, within the purview of the statute, or that the specific intent, the essential characteristic of the offense, exists. Therefore, in *Moore v. State*, 18 Ala. 533, an affirmative instruction, "that the same facts and circumstances which would make the offense murder, if death ensued, furnish sufficient evidence of the

intention," was declared erroneous. The court say: "There are a number of cases, where a killing would amount to murder, and yet the party did not intend to kill. As if one from a house-top recklessly throw down a billet of wood upon the sidewalk where persons are constantly passing, and it fall upon a person passing by and kill him, this would be, by the common law, murder; but if instead of killing him, it inflicts only a slight injury, that party could not be convicted of an assault with intent to murder." Other illustrations may be drawn from our statutes; murder in the first degree may be committed in the attempt to perpetrate arson, rape, robbery or burglary, and yet an assault committed in such attempt is not an assault with intent to murder. If the intent is to ravish, or to rob, it is, under the statute, a distinct offense from an assault with intent to murder, though punished with the same severity. And at common law, if death results in the prosecution of a felonious intent, from an act *malum in se*, the killing is murder. As if A shoot at the poultry of B, intending to shoot them, and by accident kills a human being, he is guilty of murder. 1 Russ. Cr. 540. Yet if death did not ensue, if there was a mere battery, or a wounding, it is not, under the statute, an assault with intent to murder. The statute is directed against an act done, with the particular intent specified. The intent, in fact, is the intent to murder the person named in the indictment, and the doctrine of an intent in law different from the intent in fact, has no just application; and if the real intent shown by the evidence is not that charged, there cannot be a conviction for the offense that intent aggravates, and in contemplation of the statute, merits punishment as a felony. *Ogletree v. State, supra*; *Morgan v. State, supra*. As is said by Mr. Bishop, the reason is obvious, the charge against the defendant is, that in consequence of a particular intent reaching beyond the act done, he has incurred a guilt beyond what is deducible merely from the act wrongfully performed; and, therefore, to extract by legal fiction from this act such further intent, and then add it back to the act to increase its severity, is bad in law. 1 Bish. Cr. Law, § 514.

An application of these general principles will show that several of the instructions given by the City Court were erroneous, and some of them misleading, or invasive of the province of the jury. The *sixth* asserts the familiar principle of the law of evidence, that a man must be presumed to intend the natural and probable consequences of his acts, and from it draws the conclusion, "that if a

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man shoots another with a deadly weapon the law presumes that by such shooting he intended to take the life of the person shot." Whether this instruction would, or would not be correct, if death had ensued from the shooting, and the defendant was on trial for the homicide, it is not now important to consider. In a case of this character the instruction is essentially erroneous, for if it has any force it converts the material element of the offense, the intent to murder a particular person, into a presumption of law, drawn from the nature of the weapon, and the act done with it; while the intent is a fact which must be found by the jury, and the character of the weapon, and the act done, are only facts from which it may or may not be inferred. The weapon used, and the act done, may, in the light of other facts and circumstances, import an intent to maim, or merely to wound, distinct offenses from that imputed to the defendant; and maiming or wounding is a probable, natural consequence of the act done with such weapon. In *Morgan v. State*, 33 Ala. 413, the court, at the request of the defendant, charged the jury "that they must be convinced, beyond all reasonable doubt, that the prisoner intended to shoot Scrimshire" (the prosecutor) "before they can convict the prisoner of an assault with intent to murder," but added, referring to the particular facts of the case, "that the presenting of a pistol, loaded and cocked, within carrying distance, by one man at another, with his finger on the trigger, in an angry manner, is, of itself, an assault with intent to murder." This court said: "The explanatory charge given by the court in this case cannot be supported. It ignores one of the material facts which constitute the offense for which the prisoner was on trial. The defendant was not guilty as charged, unless he committed the assault, and this act was done with a special intent to kill and murder the person assaulted." It was said the facts were proper for the consideration of the jury, and (quoting from *Ogletree v. State, supra*), that it was competent for them, in their deliberations, "to act upon the presumptions which are recognized by law, so far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence. It does not, however, result as a conclusive presumption at law, from the facts supposed in the charge, that the accused had the intent to take the life of Scrimshire; the surrounding circumstances should have been considered by the jury, and unless the jury were convinced that the prisoner entertained the particular intent to take the life of his adversary, then the prisoner could not be convicted

of the higher crime. The particular intent reaches beyond the act done, and is a fact to be found preliminary to conviction, as necessary to the other fact itself, viz., that the assault was committed. In other words, while the law permits and commands juries to indulge all reasonable inferences from the facts in proof, it does *proprio vigore*, infer the one fact from another." In *Scitz v. State*, 23 Ala. 42, a similar question was considered. On an indictment for an assault with intent to murder the jury returned a special verdict finding the defendant "guilty of striking with a loaded whip, calculated to produce death, without any excuse or provocation," on which judgment of conviction was pronounced, which was reversed because it was not a legal conclusion from the facts stated that the defendant had the particular intent to murder the person assailed. "An assault simply with intent to frighten," say the court, "maim or wound, without producing death, or for the purpose of inflicting punishment or disgrace, is equally consistent with the finding of the jury, as that it was an assault with intent to murder." The true principle is, that the particular intent, the intent to murder the person assailed, is matter of fact, about which the law raises no presumptions and indulges no inferences. *State v. Stewart*, 29 Mo. 419. The jury must find the fact; and in ascertaining its existence they may and will draw inferences from the character of the assault, the want or the use of a deadly weapon, and the presence or absence of excusing or palliating circumstances. *Meredith v. State*, in manuscript. What are the presumptions or inferences, in view of all the facts, they must be left free to determine; and the court misleads them and invades their province, if a part only of the facts is singled out, and they are instructed from them, the felonious intent must be inferred.

The particular facts of the case in one phase in which the evidence presents it, are so interwoven with the remaining instructions, that a determination of the primary question they involve is necessary to a correct understanding of them. This question is the right of a land owner to plant spring-guns on his premises, by which trespassers may be wounded, and what is his liability, if thereby a trespasser receives grievous bodily harm. Whether he was civilly liable at common law, was agitated in *Deane v. Clayton*, 7 Taunt. 518, but not decided, the judges being equally divided in opinion. In *Ilott v. Wilkes*, 3 B. & Ald. 304, the Court of Kings Bench unanimously decided that "a trespasser having knowledge that

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there are spring-guns in a wood, although he may be ignorant of the particular spots where they are placed, cannot maintain an action for an injury received in consequence of his accidentally treading on the latent wire communicating with the gun, and thereby letting it off." Statutes followed soon after this decision, rendering the setting or placing spring-guns, and other like agencies calculated to destroy human life, or to inflict grievous bodily harm on trespassers, or others coming in contact with them, a misdemeanor. 1 Russ. Cr. 783. It is not our province to deny that the decision in *Ilott v. Wilkes* is a correct exposition of the common law of England as it then existed. The common law of England, is not in all respects the common law of this country. *Vanness v. Packard*, 2 Pet. 144. This court has frequently said that, in this State, only its general principles, which are adapted to our situation, and not inconsistent with our policy, legislation and institutions, are of force, and prevail. *State v. Cawood*, 2 Stew. 360; *N. & C. R. R. Co. v. Peacock*, 25 Ala. 229; *Barlow v. Lambert*, 28 id. 704. We concur in the conclusions reached by the Supreme Court of Connecticut in *Johnson v. Patterson*, 14 Conn. 1; *State v. Moore*, 31 id. 479, after a careful examination, that the principle announced in *Ilott v. Wilkes* is not in harmony with our condition or our institutions, and that it had its origin in a state of society not existing here, and the necessity for protection to a species of property not here recognized, or if recognized, of less importance and value than the legislation of Great Britain, and the common law there prevailing attached to it.

It is a settled principle of our law, that every one has the right to defend his person and property against unlawful violence, and may employ as much force as is necessary to prevent its invasion. Property would be of little value, if the owner was bound to stand with folded arms and suffer it taken by him who is bold and unscrupulous enough to seize it. But when it is said a man may rightfully use as much force as is necessary for the protection of his person and property, it must be recollected the principle is subject to this most important qualification, that he shall not, except in extreme cases, inflict great bodily harm, or endanger human life. *State v. Morgan*, 3 Ired. 186. The preservation of human life, and of limb and member from grievous harm, is of more importance to society than the protection of property. Compensation may be made for injuries to, or the destruction of, property; but for the

deprivation of life there is no recompense; and for grievous bodily harm, at most, but a poor equivalent. It is an inflexible principle of the criminal law of this State, and we believe of all the States, as it is of the common law, that for the prevention of a bare trespass upon property, not the dwelling-house, human life cannot be taken, nor grievous bodily harm inflicted. If in the defense of property, not the dwelling-house, life is taken with a deadly weapon, it is murder, though the killing may be actually necessary to prevent the trespass. The character of the weapon fixes the degree of the offense. But if the killing is not with a deadly weapon—if it is with an instrument suited rather for the purpose of alarm, or of chastisement, and there is not an intent to kill, it is manslaughter. *Carroll v. State*, 23 Ala. 28; *Harrison v. State*, 24 id. 21; *State v. Morgan*, 3 Ired. 186; *Commonwealth v. Drew*, 4 Mass. 391; *McDaniel v. State*, 8 Sm. & Marst. 401; *State v. Vance*, 17 Iowa, 138; Whart. Hom. §§ 414–417. However true this may be, of violence the owner directly in person inflicts, for a trespass, or in defense, or prevention of a trespass, committed in his presence, the argument now made by the counsel for the appellant is that of the court in *Ilott v. Wilkes*, that for the prevention of secret trespasses, committed in the absence of the owner, he may employ means of defense and protection to which he could not resort if present, offering personal resistance. The instructions requested place the proposition in its most imposing form, of protection against repeated acts of aggression committed in the night-time by unknown trespassers. For the prevention of such trespasses, he may, it is said, employ any agency or instrumentality adequate to the end, even though it involves, of necessity, grievous bodily harm, or death to the trespasser. The proposition itself subordinates human life, and the preservation of the body in its organized state, to the protection of property. It subjects the man to loss of limb or member, or to the deprivation of life, for a mere trespass, capable of compensation in money. How else can the owner protect himself? it is asked. The answer may well be, he is not entitled to protection at the expense of the life, or limb or member of the trespasser. All that the latter forfeits by the wrong is the penalty the law pronounces. At common law, he would be compelled to compensation, for particular trespasses, and of the nature, in one respect, the defendant intended to guard against—the severance from the freehold of its products—not only is he compelled to compensation, but under our statutes, indictable for a misdemeanor.

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It may well be asked, in return, if the owner has the right to visit on the trespasser a higher penalty than the law would visit? Has he a right to punish a mere trespass as the law will punish the most aggravated felonies, which not only shock the moral sense, evince an abandoned, malignant, depraved spirit, but offend the whole social organization? There are but few offenses the law suffers to be punished with death. Whether this extreme penalty shall be visited the law submits to the discretion and to the mercy of the jury — they may consign the offender to imprisonment for life in the penitentiary. There is no offense which is punished by the laceration of the body, or by loss of limb or member. Shall the owner, for the prevention of a trespass, inflict absolutely the penalty of death, a jury could not inflict, nor a court sanction? Inflict it without the opportunity the jury has, when they may lawfully inflict it, of lessening it in their mercy and discretion to imprisonment? Shall he, in protection of his property, lacerate the body, a punishment so revolting that it has long been excluded from our criminal code? If the owner is vexed by secret trespasses, and their repetition, his own vigilance must, within the limits of the law, find means of protection. Stronger enclosures, and a more constant watch must be resorted to, and a stricter enforcement of the remedies the law provides will furnish adequate protection. If these fail, it is within legislative competency to adopt remedies to the exigencies and necessities of the owner.

It is said the spring-gun, or like engine, is harmless, if of his own wrong the trespasser does not come in contact with it. Admit it, and the controlling, underlying consideration is not met. If it was conceded thereby he lost his right to recover compensation for the injury sustained, the State does not lose the right, nor is its duty lessened, to demand retribution for its broken laws, and the unlawful death or wounding of one of its citizens. With certainty the measure of protection to property is declared, and the force which may be employed in its defense is defined. The secrecy of the trespass, or the frequency of its repetition, does not enlarge the one or the other. Life must not be taken, nor grievous bodily harm inflicted. The trespasser is always in fault — it is his own wrong, which justifies force, to the extent it may be lawfully used, or to the extent it may be provoked and exerted. The secrecy and frequency of the trespass would not justify the owner in concealing himself, and with a deadly weapon, taking the life, or grievously wounding the trespasser, as he crept stealthily to do the wrong intended. What difference is there

in his concealing his person, and weapon, and inflicting unlawful violence, and contriving and setting a mute, concealed agency or instrumentality which will inflict the same, or it may be greater violence? In each case, the intention is the same, and it is to exceed the degree of force the law allows to be exerted. In the one case, if the trespasser came not with an unlawful intent — if his trespass was merely technical — if it was a child, a madman, or an idiot, carelessly, thoughtlessly, entering and wandering on the premises, the owner would withhold all violence. Or he could exercise a discretion, and graduate his violence to the character of the trespass. The mechanical agency, is sensitive only to the touch — it is without mercy, or discretion, its violence falls on whatever comes in contact with it. Whatever may not be done directly cannot be done by circuitry and indirection. If an owner, by means of spring-guns or other mischievous engines planted on his premises, capable of causing death or of inflicting great bodily harm on ordinary trespassers, does cause death, he is guilty of criminal homicide. Whart. Cr. Law, §§ 418, 553.

The degree of the homicide depends on the facts already stated. If the engine is of the character of a deadly weapon, the killing is murder. It could not be employed without the intent to injure, and without indifference whether the injury would be death, or great bodily harm. But if not deadly in its character, if it is intended only for alarm, and for inflicting slight chastisement, or mere detention of the trespasser until he shall be freed from it, there may be no offense, or at most but manslaughter. The character of the instrument, and its probable capacity for injury, may repel all presumption to do more than merely alarm, or without inflicting any corporal harm, merely to detain the trespasser, and stay him in his efforts to wrong, and if death should ensue, it would be beyond the intention of the owner, and an unforeseen, and not a natural or probable, consequence of an act in itself not unlawful. For it is lawful to frighten away the trespasser, or by detaining him and staying the wrong he contemplates, to involve him in disgrace; to detect him, and to deter him from future trespasses. If the instrument is adapted only to the purposes of punishment, and it should inflict a punishment from which death ensued, the offense is manslaughter, as it would have been if the owner in person had inflicted the violence. The instructions requested by the appellant were inconsistent with these views, and were properly refused.

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The instructions given by the City Court are some of them based on the theory, that if death had ensued from the wounding of the prosecutor, by the spring-gun, it would have been murder, it is a legal sequence, that the defendant is guilty of an assault with intent to murder. Others proceed on the theory that he is guilty of an assault with intent to murder, if the spring-gun was set with the specific intent to kill the prosecutor, whom he suspected as the trespasser, and against whom he bore malice, although there was also a general intent to kill whoever was the trespasser, coming in contact with it. We regard each class of instructions as erroneous.

An error pervading the first is, that a general felonious intent is made the equivalent of the specific felonious intent, which we have said is the indispensable element of the offense, with which the prisoner stands charged. A general felonious intention, by implication of law, will convert the killing of a human being into murder, though his death or injury was not within the intention of the slayer. So, also, if there is the felonious intention to kill one, and the fatal blow falls on another, causing death, it is murder. The act is referred to the felonious intent existing in the mind of the actor, and by implication of law supplies the place of malice to the person slain. Whart. Hom. § 183; 4 Black, 261; *Bratton v. State*, 10 Humph. 103. The doctrine of an intent implied by law, different from the intent in fact, can have no application to the offenses the statute punishes. It is excluded by the terms of the statute, which include only direct assaults on the person of the party it is averred there was the intent to murder. If in fact there was not the intent to murder him whether there was a general felonious intent, or an intent to do harm to some other individual, is not important — there can be no conviction of the aggravated offense. *Morgan v. State*, 13 Sm. & Mar. 242; *Jones v. State*, 11 id. 315; *Norman v. State*, 24 Miss. 54.

An assault is defined as an intentional attempt, by violence, to do a corporal injury to another. In *Johnson v. State*, 35 Ala. 363, it is defined as "an attempt or offer, to do another personal violence, without actually accomplishing it. A menace is not an assault, neither is a conditional offer of violence. There must be a present intention to strike." In *Lawson v. State*, 30 Ala. 14, it is said: "To constitute an assault, there must be the commencement of an act, which if not prevented, would produce a battery;" the drawing of a pistol, without cocking or presenting it, is not an assault. In *State v. Davis*, 1 Ired. 125, it is said by GASTON, J.: "It is difficult in

practice to draw the precise line which separates violence menaced, from violence begun to be executed, for until the execution of it is begun, there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by an *act*, which is not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, and the battery is attempted." Constructive assaults are not within the statute. The ulterior offense; the principal felony intended, and the intent to accomplish which is the aggravating quality of the offense, consists in actual violence and wrong done to the person. The assault must, therefore, consist of an *act* begun, which if not stopped or diverted, will result, or may result in the ulterior offense, and the act when begun must be directed against the person who is to be injured. *Evans v. State*, 1 Humph. 394; *State v. Freels*, 3 id. 228. It must also be an act which, when begun, the person against whom it is directed has the right to resist by force. 2 Arch. Cr. Pl. 224, 2 note.

The setting a spring-gun on his premises, by the owner, is culpable only because of the intent with which it is done. Unless the public safety is thereby endangered, it is not indictable. *State v. Moore*, 31 Conn. 479. If dangerous to the public, it is indictable as a nuisance. Resistance by force to the setting of it, by any individual (if not dangerous to the public), the law would not sanction, though he may apprehend injury to him is intended if he trespass on the premises. The injury exists only in menace—it is conditional, and his own act must intervene and put in motion the force from which injury will proceed. While, because of the unlawful intention with which the gun is set the owner is made criminally liable for the consequences he contemplates, it is not his violence, except by implication of law, which produces the injury. It is not, consequently, an assault which, connected with an intent to murder, is punishable under the statute. If the gun is set with the intent to kill a particular person, who is injured by it, whether it is not an attempt to murder committed by means not amounting to an assault, indictable under another clause of the statute, is a question this record does not present.

The result is that the judgment of the City Court is reversed and the cause remanded. The prisoner will remain in custody until discharged by due course of law.

Hammons v. State.

HAMMONS v. STATE.

(59 Ala. 164.)

Arrest and bail — bail on Sunday

An undertaking of bail for murder, entered into on Sunday during vacation, is a case of necessity and valid.

ACTION on a bail bond. The opinion states the case. The plaintiff had judgment below.

Gamble & Bolling and *J. W. Posey*, for appellants. Contracts, of whatever description, are void if executed on Sunday, unless within one of the exceptions contained in the Revised Code, § 1882. 5 Ala. 467; 9 id. 198; 10 id. 566; 11 id. 885; 13 id. 360; 41 id. 132. An action cannot be maintained on a bond which is executed on the Lord's day, either from necessity or charity. 13 Metc. 284. A recognizance taken on Sunday is void. 33 Maine, 539. To create a legal necessity there should be at least great danger of some loss or wrongful injury that could not be otherwise avoided or repaired. 20 Ark. 289; 2 Pars. Cont. pp. 760, 761. It is insisted that the cases of *Hooper v. Edwards*, in 18 Ala. 280, and 20 Ala. 528, sustain the position of the appellees. In that case great and inevitable loss was threatened. But here no loss, injury or destruction could have been incurred by waiting till the succeeding day. Necessity is a strong term, being compulsory and making the contrary of a thing almost impossible. 2 Bouv. Law Dict. p. 212.

Herbert & Buell, for appellee.

BRICKELL, C. J. (Omitting a minor consideration.)

The principal in the present case was in custody on an indictment for murder, and the Circuit Court, in which the indictment was pending, adjudging in term time that he was entitled to bail, fixed its amount and directed the sheriff to take, in vacation, an undertaking for his appearance with sufficient sureties. The appellants joined him in the undertaking taken by the sheriff in vacation, which they now insist was executed on Sunday, and is void as violation of the

statute which prohibits all contracts made on Sunday unless for the advancement of religion, or in the execution, or for the performance of some work of charity or in case of necessity. Code of 1876, § 2138. . What effect this statute has on the common-law principle that the acts of ministerial officers done on Sunday are valid, is not a question which ought, in the present case, to be considered and decided to its full extent. By no just interpretation can the statute be extended to the acceptance by a mere ministerial officer of an undertaking of bail which the statutes and the order of court command him to take, leaving nothing to his discretion except the sufficiency of the sureties tendered. If the principal had been at large it would have been the duty of the sheriff to have arrested him; or if he had been on bail, his sureties could have surrendered him; or if an exigency existed requiring it, the sheriff could have transferred his custody to another or could have changed the place of it. The acceptance of the undertaking on Sunday is no more than a transfer of the custody, a change of its place. The bail instead of the sheriff became the keepers. It would be repugnant to the policy of the statutes, which are framed with so much care to afford the largest opportunity for relief from actual imprisonment on giving bail, to construe the statute referring to contracts made on Sunday as lessening the opportunity and prolonging the imprisonment. *Rice v. Commonwealth*, 3 Bush (Ky.), 14. The exception in the statute, "in case of necessity," has been heretofore held by this court to embrace a contract made by a creditor to secure his debt from an absconding debtor. *Hooper v. Edwards*, 18 Ala. 280; *S. C.*, 25 id. 528. The Supreme Court of Illinois, in *Johnston v. People*, 31 Ill. 469, held the taking of a recognizance of bail from one charged with a criminal offense was a *work of necessity* within the exception of their statute. In *Flagg v. Inhabitants of Millbury*, 4 Cush. 244, the Supreme Court of Massachusetts say: "By the word 'necessity' in the exception we are not to understand a physical and absolute necessity, but a moral fitness or propriety of the work and labor done under the circumstances of any particular case, may well be deemed necessity within the statute." There seems to us no ground on which the defense against the undertaking, because of its execution on Sunday, ought to be sustained; and if sustained it would diminish a right of personal liberty the statutes have been carefully framed to secure. The case of *Shippey v. Eastwood*, 9 Ala. 198, was a mere private

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contract between individuals in which officers of the law had no agency, and which was not expressly authorized by statute and ordered by a court of competent jurisdiction.

[Omitting other considerations.]

Judgment affirmed.

MOBILE AND MONTGOMERY RAILWAY CO. v. CLANTON.

(59 Ala. 392.)

Master and servant — responsibility of servant to master for consequences of his negligence.

In an action by a railway conductor against his employer for wages, the employer may set off and recover damages resulting to him from the conductor's negligence in performing the work; and the conductor is not relieved from his duty to exercise reasonable care by the known imperfect equipment of the train in respect to which his negligence occurred.

ACTION for wages by a railway conductor. The opinion states the facts.

Clopton, Herbert & Chambers, for appellant.

Sanford & Moses for appellee. The appellant is bound to furnish and maintain suitable instrumentalities for the work or duty which it requires of its employees, and it is "liable for any damages flowing from such neglect of duty." *Patterson v. P. & C. R. R. Co.*, 76 Penn. St. 389; S. C., 18 Am. R. 412-415; *Caldwell v. Brown*, 3 P. Smith, 453; *Frazier v. Penn. R. R. Co.*, 2 Wright, 104. Since this is true it follows that it cannot recoup "damages flowing from such neglect of duty in an action brought by its employee for wages due from the company."

MANNING, J. Appellee, Clanton, who was plaintiff in the City Court, was conductor of freight trains on the railroad of appellant. The cab-car, or caboose, at the end of a train under his charge, got damaged without his fault, on its passage to Mobile. The cord also was broken by which communication was maintained between it and the engine at the front. And when a train was made up for him,

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for the return trip, to come up at night, he was not furnished according to his request, with a cord that should connect the rear car with the locomotive, and was obliged to take a place with the engineer in the locomotive at the head of the train. One of the hooks, also, by which lamps with red lights are fixed to the two sides at the rear end of the hindmost car, that it may, among other reasons, be seen from the engine in front whether the train is complete or not, was broken off. Plaintiff, therefore, attached but one lamp to that car, and hung the other on the hook upon the side of the next car before the last one, and on the opposite side of the train. This was the same side which the engineer occupied in the locomotive, while Clanton sat on the other side, where only the light on the hindmost car could be seen from the locomotive. He did not inform the engineer that the light which the latter could see, was not on the hindmost car, but on the next in front of it. And the engineer was thus justified in considering the train complete as long as he could see that light. It was a duty of the conductor as well as the engineer to look well to his train, and keep it together.

On the way up, this hindmost car loaded with freight and locked, got detached from the train, which proceeded thirteen or fourteen miles further before this fact was discovered. Behind it, as Clanton knew, a fast passenger train was coming up from Mobile. And his train stopped five minutes at a station seven miles distant from the place at which the detached car was left upon the track; and while there, it being his duty to report by telegraph from that point for the train following him, the condition of his train, he dispatched back a message that it was all right.

A short time afterwards, the upward bound passenger train without any fault of its engineer or conductor, ran into the detached car, damaged it to an amount of nearly \$200, and broke off the pilot to the engine of that train, causing a still further loss.

Clanton asked of the yard-master in Mobile, whose business it was to make up the freight trains, for a cord which was not furnished him. He was told that he must apply for it in Montgomery, and that if he declined to conduct the freight train up another conductor would be directed to do so, and he came with it to avoid losing his place. There was some evidence that the application for a cord was not made to the right person.

Having been discharged by the company, Clanton sued it for his wages in arrear, and by pleas of set-off and recoupment the defendant

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insisted that he should be charged with the loss it had sustained by the collision which was produced, it is contended, by his negligence.

The court, among other charges to the jury, gave the following, which was excepted to on the part of the company: "The Mobile and Montgomery Railway Company is bound to furnish and maintain suitable instrumentalities for the discharge of the duties it requires of its employees; and if the jury believe from the evidence that the company did not properly equip the train on which the accident happened on the seventeenth of December, the defendant cannot recoup and the jury must find for the plaintiff."

The fault of this charge is that it relieves the plaintiff of responsibility for all the consequences of his own negligence, as an employee of the company, if he was guilty of any on this occasion. The law is justly very strict in requiring railroad companies, in behalf of their customers and the public who depend upon them for transportation of persons and property, to be provided, to the utmost of their power, with the means of safely performing their duties as carriers. Among the most important of the instrumentalities to this end are faithful, competent and vigilant employees. More accidents are probably occasioned by their inattention than in any other manner. Now and then when a great disaster, with the loss of many lives, is caused by the carelessness or recklessness of a railroad engineer or conductor the public become, perhaps, unreasonably furious and clamor to have him hanged. But except on such occasions, they are apt to forget that negligence on the part of such agents while running railroad trains is almost always but little less than a crime. A score or more of persons might probable have been killed or maimed by the collision in question if it had happened at a place a hundred or two yards from that at which it occurred, and a loss of thousands of dollars instead of hundreds might have been thereby cast upon the company. Is it not evident, then, that if this collision was caused by a plain neglect of duty on the part of the conductor, and could have been avoided by a due degree of watchfulness, that it was manifest error to say that because the train was not perfectly equipped he is not responsible?

Moreover, the charge in question ignores the well-established difference between the liability of a railroad company to its employers and its liability to its employees; its responsibility to its customers, the public, and that to the persons in its service. As we said, in the *Mobile and Montgomery Railroad Company v. Smith* (in manu-

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script), the former pay the company to perform services for them, the latter are paid by the company to perform work for it. Their skill and diligence are bargained for, because needed for the purpose of making repairs, completing equipment and preventing accidents, to the end of enabling the company safely and efficiently to fulfill its engagements, and they are paid according to the character and exactions of the service. Generally, also, there must be co-operation with them on the part of other employees of the company in the work to be performed. Wherefore it has often been ruled, that as between their employers and themselves, employees assume the ordinary risks and perils of the service, including those arising from the negligence of their fellows in the same work.

Whether, however, the fault of not having the freight train on this occasion fully equipped be chargeable upon the company or its servant, the yard-master of Mobile, is a matter of no consequence here. If it was the fault of either, and that was the cause of the collision and damage complained of, and these are not attributable to the negligence of Clanton, he is not liable for the loss occasioned thereby; but if they are attributable to his negligence he is liable.

It may often happen, by accident or otherwise, that a company's railroad, or trains on it, are out of order and cannot immediately be perfectly equipped, while at the same time it has duties to perform as a carrier which cannot well be delayed until everything is in perfect order. The consequences of delay may be more serious than the probable consequences of sending a train forward without being completely equipped. There may, indeed, be very little risk in doing the latter under careful management; and unquestionably, a conductor, who knowing the deficiencies, undertakes to carry such a train through, is bound to use all the diligence and watchfulness that are reasonably necessary to do so successfully; and it follows that he is responsible for the damages that may happen by reason of his negligence. His vigilance should be proportioned to the importance and delicacy of the task assumed.

We have referred to some of the facts in this case, and the possible deductions from them, only in explanation of the law on the subject. It must not be inferred that we are of the opinion that the accident complained of was caused by the fault of Clanton. Whether it was or not is a question to be answered only by a jury. It seems to be admitted that he was in no way responsible for the uncoupling of the hindmost car; and perhaps he was not to

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be blamed for not having found out that it was uncoupled in time to prevent the accident that followed. There was evidence that the night was foggy and that the smoke of the locomotive hung low, and perhaps sometimes prevented the lamps from being seen. It is a case for a fair and just inquiry by the jury whether the damage produced by the accident is to be ascribed to Clanton's negligence or not. But the jury should be informed that if it is chargeable on him he is not to be exonerated from liability merely because when he undertook the service there were deficiencies which were not concealed from him in the equipment of the train, but not such as should have prevented a conductor, who was duly careful, from carrying it safely through.

If the jury should find Clanton chargeable with the damages, there is no doubt that the company may be allowed to recoup them against his wages.

In respect to set-off the law now is that "mutual debts, liquidated or unliquidated demands *not sounding in damages merely*, subsisting between the parties at the time of suit brought, may be set off one against the other." Code of 1876, § 2991. Whenever the defendant can maintain a cross action at law because of matters arising out of the plaintiff's breach of the contract sued on, and the damages recoverable are fixed by a legal standard, such damages may be insisted on as a set-off in an action upon the contract. *Eads v. Murphy*, 52 Ala. 526, and cases cited. If Clanton is liable for anything in this case it is for not performing, with due vigilance and diligence, his contract to serve as conductor. And if the loss resulting from such negligence consists only of the damage done to cars or other property, the amount of which depends upon the expense of making them good by repairs, or of putting the defendant, in these particulars, in as good a condition as it was in before, such damages may be considered as "fixed by a legal standard." The computation is founded on the ascertainable values of material things, as it would be in an action of *assumpsit* concerning the same values.

And where such damages are set off by a defendant and exceed the amount of plaintiff's claim, according to section 2992 of the Code of 1876, a verdict and judgment for the excess may be rendered upon a proper plea of set-off in favor of the defendant.

Let the judgment of the Circuit Court be reversed and the cause remanded.

GILLESPIE V. NABORS.

(59 Ala. 441.)

Partition—unborn child.

The court has no jurisdiction to order partition of lands, between heirs of a father, where the petition alleges that one heir is alive and that the mother is pregnant by the father.*

BILL for injunction. The opinion states the facts.

Hargrove & Lewis and *Hewitt & Walker*, for appellants,

Morgan, Lapsley & Nelson and *Terry & Lane*, for appellees.

STONE, J. "Lands of an estate may be sold by order of the Probate Court having jurisdiction of the estate, when the estate cannot be equitably divided amongst the heirs or devisees." Code of 1876, § 2449.

"If, on the hearing of the application, the facts are not proved, the same must be dismissed at the costs of the applicant, for which execution may issue against him and his sureties." Id. § 2459.

One of the fundamental conditions—one of the jurisdictional facts—on which this power of the Probate Court can be called into exercise, is, that there are heirs or devisees of the estate, amongst whom the lands cannot be *equitably divided*. Division implies two or more claimants or recipients; and its aim and object are, that the property, when divided, shall pass into separate enjoyment. Hence, a petition for a sale of lands, which shows on its face that there is but one heir or devisee, is a nullity, because it presents a case over which the Probate Court has no jurisdiction to decree a sale. *Pettit v. Pettit*, 32 Ala. 288, and authorities cited.

The legal title to the lands in controversy was in John S. Gillespie, father of the present appellants, at the time of his death. At his death he left a widow, Martha S. Gillespie, and one child, James M. Gillespie, then three years old. His wife was then pregnant, and after the order of sale was obtained, under which the lands were

* As to rights of posthumous children, see *Shotts v. Poe* (47 Md. 513), 28 Am. Rep. 485.

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sold, was delivered of another child, who still lives, and is named John S. Gillespie. The petition sets forth that the estate is solvent — and “further represents to your honor that the heirs of said deceased are his child, a son named James M. Gillespie, about three years of age—who is a resident of said county, and who lives with his mother, Martha S. Gillespie, the widow of said deceased, who is of full age and a resident of said county, and who is now believed to be pregnant at this time.” The petition then described the lands, containing about 700 acres, and proceeded with the averment that “said lands are of unequal value, and are so situated and are of such dimensions respectively that they cannot be equitably divided among said heirs.”

This petition was filed by the administrator of the estate, was addressed to the probate judge of the proper county—the court took jurisdiction of the case, made the proper orders, had proof taken by deposition as in chancery causes—and granted an order to sell the land for division. The administrator proceeded, after advertisement, to sell the land, and Daniel W. Prentice became the purchaser, and obtained possession and a deed to the land. Ejectment was brought by the two heirs of Gillespie above named, to recover possession of the lands, and rents, from the heirs of Prentice. The bill in the present case was filed by the administrator and heirs of Prentice to enjoin the prosecution of said action of ejectment; and the question which meets us at the threshold, is, was the sale, made under said order of the Probate Court, void for want of proper jurisdictional averments?

We have seen above that the petition sets forth only one heir, James M. Gillespie, and the belief that there will be another. then *in ventre sa mere*. Had this unborn child such a legal existence, as that, with the other named heir, it gave the court jurisdiction to order a sale for division between the two?

In *Marsellis v. Thalhimer*, 2 Pai. 35, the court said: “The broad and unqualified language which has been used by some of the judges, has induced the appellant’s counsel to suppose the unborn child was to be considered in existence for every purpose whatever, whether for its own benefit, or that of others. * * * But it must be recollected that the existence of the infant as a real person before birth is a fiction of law, for the purpose of providing for and protecting the child, in the hope and expectation that it will be born alive, and be capable of enjoying those rights, which are thus pre-

served for it in anticipation. The rule has been derived from the civil law; * * * although by the civil law of successions, a posthumous child was entitled to the same rights as those born in the life-time of the decedent, it was only on the condition that they were born alive, and under such circumstances that the law presumed they would survive. * * * Children in the mother's womb are considered, in whatever relates to themselves, as if already born; but children born dead, or in such an early stage of pregnancy as to be incapable of living, although they be not actually dead at the time of birth, are considered as if they had never been born or conceived."

In *Bowman v. Tallman*, 27 How. Pr. Rep. 212, 272, the court said: "Infants unborn are not seized, hence courts cannot sell their interests, because such interests do not exist; they can sell only interests existing."

In *Jenkins v. Freyer*, 4 Pai. 47, 53, it was said that "a child *in ventre sa mere* at the death of the testator is considered as in *esse*, if it is afterwards born alive."

In *Harper v. Archer*, 4 Sm. & Mar. 99, 109, the court said: "It is now settled, both in England and in this country, that from the time of conception, the infant is in *esse*, for the purpose of taking any estate which is for his benefit, whether by descent, devise, or under the statute of distribution; provided, however, that the infant be born alive, and after such a period of foetal existence that its continuance in life might be reasonably expected."

In *Mason v. Jones*, 2 Barb. 229, 252, the court, speaking of a clause in their statute, in the following language: "Where a future estate shall be limited to heirs, or issue, or children, posthumous children shall be entitled to take in the same manner as if living at the death of their parent," employed the following emphatic words: "Here, then, is a complete annihilation, in law, of the time that may elapse between the death of a father, and the birth of a previously begotten child. The instant such child is born, it is made to step back to the end of the father's life, there to take its stand, and become clothed with all the rights of property previously conferred." See, also, *Hone v. Van Schaick*, 3 Barb. Ch. 488, 508; 1 Shars. Blacks. 130, and note.

From the citations above, it results that although an unborn child is treated as having an existence for certain purposes beneficial to it, yet this existence is conditional and imperfect and confers no

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rights of property until it is born alive. When that event happens to preserve successions and to prevent forfeitures it becomes, by relation and legal fiction, a separate individual person having personal and property rights dating back to the time of conception when such backward step is necessary to protect a descent or devise. If, however, the fœtus is never born alive then it is treated as if it never had an existence.

Under the facts of this case we feel compelled to hold that at the time the order of sale was petitioned for and obtained Mr. Gillespie, the intestate ancestor, had but one heir-at-law, James M. Gillespie, and that the petition was fatally wanting in necessary averments to give the Probate Court jurisdiction. The legal title, then, was not divested by the sale and conveyance, but still remains in the heirs of John S. Gillespie.

[Omitting a minor point.]

The decree of the chancellor is reversed, and this court proceeding to render the decree which the chancellor should have rendered doth order and decree that the bill in this cause be, and the same is hereby, dismissed at the costs of complainants therein incurred in the court below and in this court, and the injunction therein granted is dissolved.

DICKINSON V. BRADFORD.

(59 Ala. 581.)

Attorney and client — agreement for compensation — constructive fraud.

An agreement between attorney and client for the attorney's compensation for services rendered and to be rendered will be jealously scrutinized, and will not be supported without clear proof on the part of the attorney that it is fair and reasonable.*

BILL for specific performance. The opinion sufficiently states the case. Performance was decreed below.

John T. Heflin, for appellant.

W. H. Forney and Rice, Jones & Wiley, for appellee.

* To same effect, *Darlington's Appeal* (86 Penn. St. 512), 27 Am. Rep. 126.

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BRICKELL, C. J. The bill is filed to enforce the specific performance of a contract made between attorney and client after the relation had been formed, by which the client, in consideration of services which had been and were to be rendered, covenanted to convey to the attorney an undivided half of a described tract of land. There are many disputed questions of fact involved which are immaterial in the view we are constrained to take, and a consideration of which is, therefore, unnecessary. The relation of an attorney to his client is one of trust and confidence in which influence is, of necessity, acquired. The law does not incapacitate him from contracting with, or from becoming the recipient of, the bounty of the client. It does, however, command that all his transactions with the client shall be anxiously and jealously scrutinized that the client may be protected from his own overweening confidence, and from the influence or ascendancy which the relation generates. 1 Story's Eq. §§ 310-314; 2 Lead. Eq. Cases (4th Am. ed.), 1216. There may be no trace of deceit, or of imposition, or of overreaching advantage, no mark of actual fraud which would justify a court in interfering for the rescission, or in refusing to compel performance, if the contract had been made between persons not sustaining a relation in which confidence was reposed and influence acquired. The court does not interfere, or refuse interference, because there has been deceit, or imposition or actual fraud, but independent of such facts and ingredients, upon considerations of public policy, to prevent fraud, an abuse of confidence and influence, and to compel fidelity and unselfishness in the performance of fiduciary duties.

In this State attorneys and solicitors are entitled to compensation for their services. Before entering on the business of the client, and suffering him to repose in them the trust and confidence of the relation, they may stipulate the measure of their compensation, and if the client assents, the contract is as valid and as free from objection as any other contract into which he may enter. But if they assume the relation, enter on the duties, thereby inviting confidence and acquiring influence, without expressly stipulating the measure of compensation, no subsequent agreement with the client can be supported unless it is satisfactorily shown that the compensation does not exceed a fair and just remuneration for the services which have been, and which it is, the duty of the attorney to render. *Lecatt v. Salle*, 3 Port. 115; *McMahan v. Smith*, 6 Heisk. Tenn. 167; *Planters' Bank v. Hornberger*, 4 Cold. 578.

Standing, as the parties do, in a relation of confidence which gives the attorney or solicitor an advantage over the client, the burden of proof lies on the attorney or solicitor, and to support the contract made while the relation existed he must show the fairness of the transaction and the adequacy of the consideration. The principle is thus stated by Judge STORY: "But the burden of establishing its perfect fairness, adequacy and equity, is thrown upon the attorney upon the general rule that he who bargains in a matter of advantage with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other."

1 Story's Eq. § 311. In the American note to *Huguenin v. Basely*, 2 Lead. Eq. Cases, 1216, the principle is stated as follows and numerous authorities cited in support of it: "In England the policy of the law forbids an attorney to contract with his client, or accept any benefit from him beyond the remuneration to which he is entitled for his professional services; and although the rule in this country is less stringent, such transactions are closely scrutinized, and the burden of the proof is on the attorney to show not only that he used no undue influence but that he gave his client all the information and advice, as against himself, which it would have been his duty to afford if he had been duly retained in a matter where his own interests were not involved. It should, moreover, appear that the transaction was not disadvantageous to the client, nor one which a prudent man would have declined. If it is a contract *the consideration must be full*; if a gift it must not be so large as to impair the donor's ability to provide for himself and the members of his family; and the burden of proof on these and other material points is on the attorney and not on those who seek to avoid the deed or transfer."

Having entered on the duties of the relation without a contract stipulating the measure of compensation, the appellee and his partner had no other legal claim on the appellant than the right to demand of him reasonable compensation for their services. If the contract subsequently made stipulates for greater compensation it cannot be supported unless it affirmatively appears that there is an absence of undue influence, and the best evidence of its absence would be that the attorneys gave to their client the information and advice which it would have been their duty to give if the client had been dealing with a stranger, conferring on him the same rights and advantages, on the same considerations, which the contract confers on them.

The claims which the attorneys were prosecuting did not amount to \$3,000. They were not litigated, and were against a decedent whose estate had been declared insolvent. It was not supposed that the full amounts of the claims could be collected, though by a vigilant scrutiny of other claims against the decedent it was supposed the dividends of the assets applicable to these claims would be increased. The lands, an undivided half of which the appellant covenanted to convey to the attorneys, had been purchased by him at public sale for cash a few days previous to the contract, Martin, one of the attorneys, bidding for him, at the price of \$3,100. The value of the lands was not less, according to the estimate of any witness, than \$2,500. The lands were the estate of the decedent and constituted the only source from which funds were to be derived for the payment of his debts. The amount actually realized by the appellant on his claims, was \$1,250, and this was allowed to him in part payment of the purchase-money of the lands. The result of the contract is consequently to give the attorneys, as compensation for their services in the prosecution of the claims, not only all, which was realized on them, but to compel the appellant to pay \$300 in money, that they may obtain an undivided half of the lands. It is too plain a prudent man would have declined entering into a contract involving such consequences, if free from extraneous influences.

The evidence fails to show, that in any event the reasonable compensation of the attorneys could have exceeded \$300, and it fails to show that when this contract was entered into, the appellant was not under the influence, and that it was not the offspring of the influence of the relation existing between the parties. There was no information to the client, that he was liable only for reasonable compensation, or of the amount of such compensation. There was no communication to him, that he was bound to pay the sum he had bid for the lands, or that if he failed, he could be made liable for the difference between the sum he had bid and the price they commanded on a resale, and that if such liability was incurred, he must bear it, the attorneys not sharing it, and he remaining liable to them, for reasonable compensation for their services. Nor is it shown, that he was advised, that if the contract into which he had entered, could be enforced according to its terms, the judgment on his claims might be adverse, and nothing realized from them, and yet, if he paid the purchase-money, he would be bound to convey to his attorneys an undivided half of the lands. Independent of all these considerations,

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the traces of the influence of the relation developed themselves, at the moment of the execution of the contract. It was produced by Martin and he said to the subscribing witness, that he wished him to attest it, with the declaration to the appellant that it was a long instrument, and there was no necessity for reading it to the witness, to which the appellant assented. The instrument is not long, containing not more than two hundred and seventy words, and the reason for not reading it is certainly frivolous. There was no necessity for reading it to the subscribing witness, or that it should be read by him, yet, there was a manifest propriety in requiring him to read it aloud to the appellant, that there should be satisfactory evidence the appellant had full opportunity to know its contents. There is no evidence, when it was written, though it is not a disputed fact that it was written by Martin; nor is there evidence that it was ever read to appellant, or that he was informed of its terms and operation before executing it. Without disregarding well-established principles the contract cannot be enforced. Though most often, the validity of contracts between persons standing in confidential relations, is contested in suits for the rescission or cancellation of such contracts, the causes which will authorize their rescission are available against decreeing specific performance of them.

If the appellant had been the actor, seeking a rescission of the contract, the court would have compelled him to do equity, and would have decreed that the contract should stand as a security to the appellee for the payment of a reasonable compensation for his services. But the appellee is the actor, and the primary object of the bill, all that gives jurisdiction to the court of equity, is the specific performance of the contract. The appellee has a clear legal right to fair and reasonable compensation for his services, but it is a legal demand, of which a court of law has full jurisdiction, and is capable of affording an adequate remedy. It does not spring out of the contract, but is independent of it, and cannot justify a decree in his favor in the present suit. A court of equity having jurisdiction of a case, will generally settle the entire litigation, though it may involve the enforcement of legal demands, for which there is an adequate remedy at law. This is true only when the court has jurisdiction of the primary purposes of the bill, and the right to relief in respect to them is shown, and the legal demand is consequent to them. The rule does not apply when the primary objects of the bill fail. *Pond v. Lockwood*, 8 Ala. 669

The decree must be reversed, and a decree must be here rendered dismissing the bill at the costs of the appellee in this court and the Court of Chancery.

WASHINGTON V. STATE.

(60 Ala. 10.)

Criminal law—murder—firing pistol into dwelling-house without specific intent to kill.

Where a homicide was committed by firing a pistol, at night, through the window of a lighted room in which four persons were sitting, the court may properly refuse to instruct the jury, on the request of the prisoner, that if he did not intend to kill or shoot at any of the inmates of the room, but merely intended to frighten them, he was not guilty of any higher offense than manslaughter in the second degree; such a charge, without qualification or explanation, being calculated to mislead the jury, by withdrawing from their consideration the recklessness of the act, as showing a depraved mind regardless of human life, which might make the offense murder in the first degree, under the statute.*

CONVICTION of murder. The homicide was committed by the prisoner's firing a pistol, at night, through the window of a lighted room in which persons were sitting. It was claimed that the act was done simply to frighten the inmates, and without aim or intent to injure or kill.

The court charged the jury, among other things, as follows: "If the evidence satisfies the jury, beyond a reasonable doubt, that the defendant shot into the house where the deceased and several other persons were at the time, and that the defendant did the shooting willfully, and knowing at the time that the persons were in the room, then such shooting would be unlawful; and if it resulted in the death of Beverly Willis, and the act evidenced a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, he would be guilty of murder in the first degree. If a person does an unlawful act, the law charges him with the knowledge of the probable consequences of such act. The jury may look to the fact that Beverly was killed, if it is shown, in connection with all the other evidence in the case, in determining

* Compare *State v. Hardie* (47 Iowa, 647), 29 Am. Rep. 496.

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whether or not the defendant, at the time, had such depraved mind as rendered him regardless of human life."

The defendant requested the court to give the following charges: "1. That if they believe, from the evidence, that the defendant, at the time he shot into the house, did not intend to shoot at Beverly Willis, or any of the parties present, but intended to shoot in the house merely to frighten the inmates, they cannot convict him of manslaughter in the first degree. 2. If the jury have any reasonable doubt, arising from the evidence, whether the defendant, at the time he shot into the house, shot at, or intended to shoot at, Beverly Willis or other occupants, or whether he only intended to shoot into the room to frighten the inmates, they must give him the benefit of that doubt, and acquit him of manslaughter in the first degree. 3. If the jury believe, from the evidence, that the defendant fired the pistol into the house for the purpose of frightening the inmates, and without aiming at, or intending to shoot any one, such action was an unlawful act, and a trespass; and if in the prosecution of such unlawful trespass Beverly was accidentally killed, the defendant is responsible for the consequences of the unlawful trespass, and is guilty of manslaughter in the second degree. 4. If the jury find, from all the evidence in the cause, that the following is a reasonable theory for the defense, growing out of the evidence: That the defendant fired a pistol into a room, which he knew to be occupied by four persons, without any design to do any personal injury to any of the occupants, but with the design simply to frighten them, and that death ensued, by accident, to one of the occupants, from such unlawful firing; then it is the duty of the jury to convict the defendant of manslaughter in the second degree; and upon the supposition that this hypothesis is reasonable, and arises naturally out of all the evidence, it is the duty of the jury to acquit the defendant of murder, and of manslaughter in the first degree."

These requests were refused.

A. A. Coleman, for the prisoner.

John W. A. Sanford, Attorney-General, for the State.

STONE, J. (Omitting a minor matter.)

"Every homicide * * * perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved mind

regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree." Code of 1876, § 4295. The prisoner, in his confession, disclaimed any intention to injure any one, and declared that his purpose was only to frighten the inmates of the house. For the purpose of considering this feature of the defense apart from all others we leave out of view all evidence of motive, malice or formed design as indicated by the prisoner's conduct at the preaching on the Sunday night preceding, by his sudden flight from the scene of his violence and by the testimony of Bina Jackson. On this question we confine ourselves to the manner of the shooting itself and to the proved position of the inmates of the house at the time the pistol was fired. If the object was simply to frighten, why fire the pistol into the house? Why not fire it near the window and pointed upward or from the house? The testimony is, that there were a burning fire and lighted lamp in the room. Then why fire diagonally through the room in the direction of where three or four inmates sat near the fire and not across the room towards the door, which would have harmed no one? The light in the room enabled him to discern where the inmates sat. Then why fire the pistol directed in proper range towards one or more of them if his object was only to frighten?

We have given expression to these reflections not with any view of pronouncing on the facts. That is not for us. Our sole object is that we may pronounce on the correctness of the charges asked and refused in the light of the testimony before the jury. All the charges asked were properly refused under the state of the proof before the jury. They were well calculated to mislead by withholding from their consideration one of the most damaging tendencies of the testimony. They ignore altogether the reckless discharge of a loaded pistol pointed, at short range, directly towards persons sitting quietly together unconscious of danger, and the inference arising therefrom of a depraved mind regardless of human life. To have justified the giving of either of the charges the jury should have been told that to constitute such mitigation of the offense it was necessary that there should be an absence of that depraved mind which does not regard human life. 2 Whart. Cr. Law, §§ 965, 997. Sport does not usually employ such dangerous methods as were resorted to in this case, and before the jury are justified in inferring the less wicked motive sought in the charges to be inferred they

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should be affirmatively convinced that there was not the depraved mind which the recklessness of the act tended to show.

The affirmative charge of the court is a correct exposition of the law.

The judgment of the court is affirmed.

COOK V. STATE.

(60 Ala. 39.)

Criminal law — receiving verdict in prisoner's absence

A verdict of felony inadvertently received in the absence of the prisoner is void and amounts to acquittal, although his counsel were present and did not object; and the error cannot be cured, after the jury have been discharged, by immediately reassembling the jury, examining on oath those who had left the court-room and again receiving the verdict in the presence of the prisoner.*

CONVICTION of burglary. The opinion states the facts.

Coleman & McQueen, for the prisoner.

John W. A. Sanford, Attorney-General, for the State, cited *Brister v. The State*, 26 Ala. 107.

MANNING, J. The offense with which defendant was charged by the indictment in this cause is a felony according to section 4095 (3541) of the Code of 1876, because punishable by imprisonment in the penitentiary. In such a case the defendant is entitled, as a right, to be present at the rendering of the verdict; and if rendered against him during his absence it is void. *The State v. Hughes*, 2 Ala. 102; *Sperry v. The Commonwealth*, 9 Leigh, 623; *S. C.*, 2 Lead. Cr. Cases, 449.

The record recites that, "upon returning their verdict" [guilty as charged in the indictment] "into court, the jury came in and handed the clerk the verdict, which was read out in open court in the absence of the defendant and the jury discharged. Two of the jurors had

* To same effect, *Temple v. Commonwealth* (14 Bush, 769), 29 Am. Rep. 442.

left the court-room, all of the others remaining therein, when the court discovered the defendant was not present, whereupon the court had the jury called together again within five minutes after they had been first discharged. The two jurors who had left the court-room were sworn and stated, on oath, that they had had no conversation with any one in regard to the case. The defendant, who had been sent for, was then brought into court. The court then handed the indictment back to the jury and asked them if that was their verdict, and they replied that it was. The defendant protested and objected to this action of the court, which protest and objection were overruled and the verdict was again received and read by the court, to which the defendant excepted. The counsel for defendant were present in court when the jury first brought their verdict into court, and did not object to its being received by the court, until after the jury were first discharged." Defendant was then in the custody of the sheriff.

It was not within the authority of prisoner's counsel to waive for him his right to be present when the verdict was delivered. *Waller v. The State*, 40 Ala. 333; *Young v. The State*, 39 id. 358; *Sperry v. Commonwealth*, *supra*; *Eliza v. The State*, 39 id. 694. And if it were, no consent to such a waiver appears by the record.

It seems to have been supposed, that if there was error in receiving the verdict under the circumstances, it was not beyond correction; and therefore, the persons of whom the jury was composed, were reassembled about five minutes after they had been discharged; and two of them having been out of the court-room, they were sworn, and under oath declared that they had not conversed with any one in regard to the case. But if the jury could then be reconstituted, to render a verdict which was the result of former deliberations, why should not the other ten jurors have been also examined under oath, as their companions were? They also could have communicated about the case with persons in the court-house, during the same five minutes after they were discharged; and it was quite as necessary that they should have been purged on this subject, as that the two should be. We think there was no virtue in such an interrogation of any of them.

In *Regina v. Vodden*, 6 Cox. C. C. 226; 22 Eng. L. & Eq. Rep. 596; 1 Lead. Crim. Cas. 547, "on the trial of a prisoner for felony, a jurymen, by mistake, delivered the verdict 'not guilty,' when the jury meant 'guilty.' The prisoner was discharged from the dock;

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but some of the jury then interposing, he was immediately brought back again, and the jury was again asked what their verdict was. They said 'guilty;' the prisoner was therefore sentenced." *Held*, that the original mistake was corrected within a reasonable time, and the conviction was right. But there it was the prisoner, not the jury, that was discharged; and this was supposed to have been done in accordance with the verdict. But that error was immediately corrected before any injustice could have been thereby committed. The jury was still in their place, and acting under the sanction of an oath from which they had not been discharged.

In *Brister et al. v. The State*, 28 Ala. 108, when the jury returned into court with their verdict, some of the prisoners were in the jail; and without observing this, the verdict was received and read aloud; and the jury, being told by the judge that they were discharged, started out of the court-room, "but had not got out of the bar," before it was discovered that the prisoners were not present. Whereupon the court immediately informed the jury that they were not discharged; ordered the clerk to hand the papers back to the jury, and had the absent prisoners brought into court. The prisoners objected to the receiving of the verdict then, upon the ground that it had been received and read aloud in their absence, and they had been deprived of their right to have the jury polled. This court denied the validity of the objection, and held that there was no error in this action of the Circuit Court.

We are of opinion that our rulings on this subject should not be extended further in that direction. The jury, in the present case, were discharged, and had dispersed among the audience in the courthouse and persons outside. It would be a dangerous precedent, to hold that, after this, the persons who composed that jury could be reassembled as such to render a verdict in a case of which they had been thus discharged.

Let the judgment of the Circuit Court be reversed. And the jury having been discharged without a legal cause, and without rendering their verdict in a legal manner, the defendant must be released from further prosecution.

CONNELLY V. STATE.

(60 Ala., 89.)

Constitutional law — waiver of jury trial in case of misdemeanor.

Although the constitution guarantees the right of trial by jury, and provides for speedy trial by jury in prosecutions by indictment, yet it authorizes the legislature to provide for prosecution of misdemeanors before justices of the peace, thereby dispensing with a trial by jury. A statute authorizing a waiver of jury trial in cases of misdemeanor, the prosecution being commenced by indictment and transferred to an inferior court, is therefore constitutional. (*See note, p. 37.*)

CONVICTION of renting a house for gaming purposes. The opinion states the facts.

Walker & Shelby, for the prisoner, cited *Cancemi v. People*, 18 N. Y. 129 ; *Lord Dacre's case*, Keyl. R. 39 ; *Work v. State*, 2 Ohio St. 296 ; *Hill v. People*, 16 Mich. 351 ; *People v. Smith*, 9 id. 193 ; *Cooley's Const. Lim.* 399.

John W. A. Sanford, Attorney-General, for the State.

STONE, J. The act "to regulate the trial of misdemeanors in Madison county," approved February 9, 1877, Pamph. Acts, 149, confers on the County Court of that county jurisdiction, concurrent with the Circuit Court of said county, "for the trial of all misdemeanors, except violations of the revenue laws of this State." The statute then provides for the transfer to the County Court, on the day of adjournment of each succeeding term of the Circuit Court, of all such causes as were pending in said Circuit Court and undetermined at the time of such adjournment ; and thereupon, "the jurisdiction of the Circuit Court shall cease, and exclusive jurisdiction shall vest in the County Court."

Section 4 of the act declares, "that it shall be the duty of the judge of the County Court, to hear counsel and decide these causes without a jury, unless the defendant demands a jury ; but the question must be put to the defendant, whether he will have a jury ; and if he waive a jury, it must be entered of record ; but if a jury is

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demanded, and in no other case, the court shall order the sheriff of said county to summon, *instantly*, twenty-four free or householders of the county, from whom a jury shall be impaneled; the procedure of the trial, except as altered by this act, to be the same as now provided by law for like cases in the Circuit Court."

In the present case the order of transfer was made to the County Court, as above provided; and before entering on the trial, as the record informs us, the defendant was asked by the court if he would have a jury, and he waived it; which was entered of record. It is contended before us, that the provision of the statute copied above is violative of the following provisions of the constitution of 1875, and therefore void: "That in all criminal prosecutions the accused has a right," etc.; "and in all prosecutions by indictment, a speedy public trial by an impartial jury," and "that the right of trial by jury shall remain inviolate." Declaration of Rights, §§ 7, 12.

In answer to this objection it might be sufficient to say, that the statute in question secures to every one tried thereunder for a misdemeanor the right of trial by jury, and he can be tried by the court only when he "waives a jury." But we place our decision on a broader ground. Section 9 of the Declaration of Rights provides, "that in cases of petit larceny, assault, assault and battery, affray, unlawful assemblies, vagrancy, and other misdemeanors, the general assembly may, by law, dispense with a grand jury, and authorize such prosecutions and proceedings before justices of the peace, or such other inferior courts as may be by law established." True, this clause of the constitution only provides, in terms, for this dispensing with a grand jury; but in conferring on the general assembly power to "authorize such prosecutions and proceedings before justices of the peace," the framers of the constitution must be understood as intending that such trials should be had, as trials before justices usually take place. We well know that such trials are without juries, unless some special statute makes their presence necessary.

In Kentucky, the constitution, like ours, guaranteed the right of trial by jury; and it contained no clause like ours, copied above from the ninth section of the Declaration of Rights. Murphy was indicted for a misdemeanor, and the question was, whether he could lawfully consent to be tried by a jury composed of less than twelve persons. The court said: "The citizen has an undoubted right to make any disposition of his money or his property which is not prohibited by

law. He may, when his right to any part of it is controverted, consent to have the controversy decided by the court, without the intervention of a jury, or by a majority of the jury, or by any number of persons acting in the capacity of jurors, and such an agreement would be obligatory upon him." *Murphy v. Commonwealth*, 1 Metc. Ky. 365.

In *State v. Mansfield*, 41 Mo. 470, the same doctrine was asserted.

In *The State v. Cox*, 3 Eng. 436, the offense charged was an assault and battery, and the question was whether, under their constitution, which guaranteed right of trial by jury, a verdict of a jury composed of less than twelve jurors, under a statute of that State, would stand. The court said: "The constitutional provision securing the right of trial by jury means a jury of twelve men according to the known technical meaning of the term. Of his right to such a jury the defendant cannot be deprived, except by his own consent. True he may waive the right and submit to a decision of six men, even to that of a justice of the peace himself, but in all cases where he may require it it is the duty of the justice to impanel a jury of twelve men for the trial of the cause." Of similar import is the case of *Brown v. The State*, 16 Ind. 496.

The legislature of New Hampshire had before them a proposition to reduce the number of jurors to six for the trial of misdemeanors, and submitted the question of their constitutional power to do so to the six judges of their Supreme Court. They held that the constitutional right to a trial by jury meant a jury of twelve men, but all the judges concurred in the following opinion: "The legislature have the general power to constitute new tribunals and to provide new modes of trials for future cases, provided the right to a trial by jury, such as the constitution intends, is secured to every one in the last resort, in every case where it is guaranteed by the constitution, and has not been waived by the party himself." See 41 N. H. 550.

In the case of *Commonwealth v. Dailey*, 12 Cush. 80, Ch. J. SHAW delivering the opinion of the court carried the doctrine of waiver of constitutional right to trial by jury, in cases of misdemeanor, much further than was done in any case quoted above.

There are some authorities in conflict with these views, but in none of them had they a constitutional provision such as is quoted from the ninth section of our declaration of rights. See *Cancemi v. People*, 18 N. Y. 128; *Work v. The State*, 2 Ohio St. 295; *Hill v. People*, 16 Mich. 351; Cooley's Cons. Lim. 309, 319.

Connelly v. State.

Under the constitution of 1875 we hold that the act "to regulate the trial of misdemeanors in Madison county," in its provision allowing parties indicted for misdemeanor and tried in the County Court to waive a jury, is constitutional.

There is nothing in any other question presented, and the judgment of the County Court is affirmed.

NOTE BY THE REPORTER.—In a very recent unpublished case the New York Supreme Court, passed upon the jurisdiction of Courts of Special Sessions to hear certain misdemeanors, such as petit larceny and assault and battery, under a statute of 1879. This statute gave those courts "exclusive jurisdiction, in the first instance," to determine those cases, thus abolishing the prisoner's right to be tried upon indictment and to give bail to answer indictment. This is the construction the Supreme Court put on it, interpreting the words "in the first instance" by reference to a right of review. It was argued that the act is unconstitutional because denying the right of trial by jury, and decisions to that effect were cited. But this is answered by reference to the constitutional amendment of 1870, which declares that "Courts of Special Sessions shall have such jurisdiction of the grade of misdemeanors as may be prescribed by law." The court observed:

"This section (26) was doubtless intended to qualify and limit section 2 of article 1 in its operation in order to meet and overcome the decisions of the courts made prior thereto, giving construction to the latter section. It was intended to confer an authority upon the legislature not before possessed by that branch of the government. It gave authority to the legislature to abridge the right of trial by a common-law jury of twelve men in certain cases, and this authority was exercised by the passage of the law of 1879. So section 2 of article 1 must be read and construed in connection with section 26 of article 6; and when so considered the constitutional provisions under discussion will stand as follows: 'The trial by jury in all cases in which it has been heretofore used, shall remain inviolate forever,' except that 'Courts of Special Sessions shall have such jurisdiction of offenses of the grade of misdemeanors as may be prescribed by law.'"

The court cited with approval the decision of the same court to the same effect upon a statute applicable only to Monroe county, in the case of *People v. Rawson*, 61 Barb. 619, and they conclude:

"It follows, therefore, that the magistrate acting as a Court of Special Sessions in this case correctly held that, under the act of 1879 above cited, that court had exclusive jurisdiction of the offense charged against the defendant and that he was bound to try it, and had no right to accept bail from the accused to answer an indictment by the grand jury. We are of the opinion that the decision of the magistrate in this regard was entirely sound in law."

In *State v. Worden*, 46 Conn., it was held that the statute of 1874 providing that in all prosecutions the accused, if he should so elect, might be tried by the court instead of by a jury, and that in such cases the court should have full power to try the case and render judgment, does not conflict with the provisions of the State constitution that every person accused "shall have a speedy public trial by an impartial jury," and that "the right of trial by jury shall remain inviolate," the court said: "Let us substitute the word 'law' for 'right.' 'The law of trial by jury shall remain inviolate.' What is its meaning? Two constructions, and two only, seem possible: First, we are to construe the word 'law' as meaning 'right,' and that brings us precisely where we are now and limits the word substantially to the individual rights of parties. If that interpretation prevails it is manifest that the prisoner gains nothing by the substitution. The only other reasonable construction is to give the word its ordinary meaning. The effect of that would be to give the then existing statutes authorizing and regulating trials by jury the force of a constitutional provision. The absurdity of such a construction will be apparent when we consider that prior to the adoption of the constitution those laws were frequently changed. Indeed, the institution itself, of trial by jury from its first existence to the present time, has barely preserved its own identity. As it existed when our constitution was adopted and as it is now, it is not the product of any one generation or of any one age, but it is the growth of centuries changing and improving with time and experience. It cannot be possible that the

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constitution intended to attach itself to the statute laws then in force and make them unchangeable. It aims rather to place the right beyond the power of the legislature to abridge it, and at the same time to leave it in the power of legislation to improve it and adapt it from time to time to the ever-changing phases of human affairs. If it be attempted to give the word 'law' a more indefinite meaning and interpret this clause as intended to perpetuate the institution or system of jury trials, the same difficulties will be encountered, for the institution existed by statute and by the common law founded on statutes originally. As such it was liable to modification, if not to repeal. It is true the institution was so thoroughly imbedded in the British constitution that it came to be regarded as the birthright of every Englishman, and as such was carefully watched and preserved unimpaired through all changes and even revolutions. The very fact that it was so jealously guarded shows that it was not absolutely irrepealable. Moreover, it was regarded as the personal right of every one to have his cause tried, or be tried himself if accused of crime, by a jury, so that the word 'right,' in its ordinary sense, expresses the idea more clearly and forcibly than any other, and in that sense alone we think it was used." "That the law is impolitic and unwise, especially in its application to capital cases and felonies generally, we are ready to concede to the fullest extent. We cannot believe that it is wise or expedient to place the life or liberty of any person accused of crime, even by his own consent, at the disposal of any one man or two men, so long as man is a fallible being. But that is a question for the legislature, and the legislature has reconsidered the matter and very properly repealed the obnoxious laws."

In *State v. Kaufman* the Iowa Supreme Court, September 18, 1879, held that a prisoner on trial for felony may consent to be tried by a jury of less than twelve. See 20 Alb. L. J. 291.

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(60 Ala., 281.)

Vendor and purchaser — vendor's lien — statute of limitations.

A vendor's equitable lien for unpaid purchase-money of land is not lost because the statute of limitations has barred an action on notes given therefor. (*See note, p 41.*)

BILL to enforce a vendor's lien for unpaid purchase-money of land. The statute of limitations had run against notes given on the purchase. The court below granted a decree for the complainant.

Snedecor, Cockrell & Head, for appellant, cited *Halfman v. Ellison*, 51 Ala. 543-548; *Perry on Trusts*, 211, § 234, and cases there cited; *Thomas on Mortgages*, 27, 28; 1 *Lead. Cas. in Eq.* 276; *Sheratz v. Nickodemus*, 7 Yerg. 9.

Thos. W. Coleman and E. Morgan, contra.

BRICKELL, C. J. The authorities which, doubtless, induced the decree of the chancellor, and which are now relied on to support it,

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are *Driver v. Hudspeth*, 16 Ala. 348, and *Relfe v. Relfe*, 34 Ala. 500. The first was a proceeding under the statute then in force (Clay's Dig. 157, § 38), in the Orphans' Court, at the instance of a vendee holding a bond for title, to compel the personal representatives of the vendor, who had died, to make him title. The purchase-money had not been paid, but an action at law on the notes given for it was barred by the statute of limitations. It was held, that a vendor retaining the legal titles, and entering into bond for its conveyance only on payment of the purchase-money, had a lien in the nature of a mortgage; that this lien the court would not divest until the purchase-money was paid, and that it was not impaired, because an action at law for the recovery of the purchase-money was barred by the statute of limitations. The court say: "The fact that the notes were barred by the statute of limitations does not destroy the lien, which is regarded in the nature of a mortgage. If the vendor, whose notes are barred, or his heirs after his death, should bring ejectment to recover the land, and thus drive the purchaser into a court of equity to enjoin the action, it is clear to my mind that the Court of Chancery would not interfere until he had paid up the purchase-money, the remedy to recover which at law had been barred by the statute of limitations. The court of equity would not decree a specific performance, in favor of one who withholds the compensation he stipulated to pay, upon the ground that the legal remedy to recover it is barred. The vendor is not bound to sue upon his note, but may rest upon the security furnished by his lien."

The contract of sale, in *Relfe v. Relfe*, was by parol, and so far as is shown by the report of the case, the vendor had not conveyed. It was held that the lien for the payment of the purchase-money was not lost or destroyed, because the statute of limitations had operated a bar for its recovery in an action at law. It was further held, that the lien could not be regarded as a stale demand within less than twenty years after the sale. It is said by the court: "The principle which preserves liens, notwithstanding the bar of the debt, is neither confined to those secured by a conveyance, as for example a mortgage, nor to those secured by a sealed instrument, nor even to those provided by an express contract." Again: "The principle is, the statute of limitations does not extinguish the debt, but merely bars the remedy by action at law, and there is no inconsistency in the prosecution of another remedy after the action at law is barred." The court was referred to the New York and Mississippi decisions,

to which the appellant now refers, and declined to follow them, saying : "These decisions are not correct expositions of the law."

We are not inclined to depart from these decisions. The present case is different in its facts, and the rights of the parties are materially different, but the difference does not render inapplicable the principle which underlies and forms the reason of these decisions. In the present case the vendor parted with the legal estate, and, taking no independent security for the purchase-money, has simply the lien which a court of equity, on its own principles, raises and enforces for his security. It is not matter of contract — it does not arise from the presumed intention of the parties, though its existence or waiver may often depend on such intention. It is subordinate to other equities acquired by strangers in ignorance of its existence, and it is moulded and fashioned by the court as the facts of the particular case may require. With the lien of a vendor retaining the legal estate as a security for the purchase-money, it has no other common element than that it is a security for a debt, passing by an unqualified assignment of the debt, and capable of enforcement by a decree of a court of equity. It has not the qualities of a mortgage, which is a conveyance of the legal estate, conferring a right of entry at law, and to which the lien of a vendor retaining the legal estate is analogous. *Bankhead v. Owens*, at present term.

The general principle, that when the security for a debt is a lien on property, personal or real, the lien is not impaired, because the remedy at law for the recovery of the debt is barred, is not, as is very emphatically and clearly stated in *Relfe v. Relfe*, confined to liens created by contract, or by instruments under seal, or by mortgages which convey a legal estate and confer a right of entry. The debt is not extinguished, though the statute of limitations may have barred legal remedies for its recovery. The bar of the statute may be removed by a subsequent promise or acknowledgment which is supported by the debt as a consideration, and the consideration rests on the moral obligation to pay, which statutes cannot obscure or impair. The debt not being extinguished, the lien for its security remains, and though legal remedies are barred, the equitable remedy to enforce the security is unaffected. It is not necessary further to pursue a discussion of the question. We cannot regard it as *res integra*. The discussion was exhausted, and is foreclosed by the decisions to which we have referred, and on their authority we are content to rest.

The decree of the chancellor is affirmed.

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NOTE BY THE REPORTER. — In *Spears v. Hartly*, 3 Esp. 81, Lord ELDON said: "If what has been stated by the defendant's counsel be law, that the debt is *discharged* by the operation of the statute of limitations, no lien could be obtained by reason of it; but the debt was not discharged, it was the remedy only. I am of opinion that though the statute of limitations has run against a demand, if the creditors obtain possession of goods on which he has a lien for a general balance, he may hold them for that demand by virtue of the lien."

To the same effect is *Higgins v. Scott*, 2 B. & Ad. 418.

The doctrine of the principal case was held in *Hopkins' Admr. v. Cockerell*, 2 Gratt. 88, but without any consideration expressed in the opinion.

In *Lingan v. Henderson*, 1 Bland, 282, the court said: "Where a mortgage, and a bond or note, has been given to secure the same debt the creditor may sue on all his remedies at the same time. He may file a bill in chancery to foreclose, bring an action in ejectment and also an action upon the bond or note. The lapse of twelve or three years would be a bar of his action upon the bond or note, but the ejectment could only be barred by the lapse of twenty years. The bill in chancery to foreclose the mortgage or to enforce the equitable lien being analogous to the proceeding at law by ejectment upon the mortgage, can only be barred by a similar lapse of time." And in *Moreton v. Harrison*, id. 499, the court said: "This equitable lien is so far a mortgage that the limitation or presumption of satisfaction arising from the lapse of twenty years, as applicable to ordinary mortgages, does, in like manner, furnish evidence or a presumption that such equitable lien has been satisfied or discharged." "No time short of the lapse of twenty years is ever deemed sufficient to raise a presumption of satisfaction."

In *Magruder v. Peter*, 11 Gill & Johns. 217, it was held that a loss of the vendor's remedy at law by limitation to the security he had received from the vendee for the purchase-money, will not bar the remedy in equity upon the ground of equitable lien.

In *Balknap v. Gleason*, 11 Conn. 160, it was held that where there are two securities for the same debt, as a note and a mortgage, one of which is barred by the statute and the other not, the creditor, notwithstanding he has lost his remedy at law on the former, may pursue it at equity on the latter. This case is a learned review of authorities and discussion of principles, and concludes that the statute bars only the remedy and not the debt, citing *Spears v. Hartly* and *Higgins v. Scott*. "The debt remains," say the court, "and a suit may be brought upon it and supported by a subsequent promise. The statutes suspend the remedy but do not cancel the debt." To the same effect are *Balch v. Onion*, 4 Cush. 559; *Thayer v. Mann*, 19 Pick. 585; *Elkins v. Edwards*, 8 Ga. 325; *Heyer v. Pruyn*, 7 Pal. 465; *Wood v. Goodfellow*, 43 Cal. 185.

In *Schmucker v. Siefert*, 18 Kans. 104; 8. C., 28 Am. Rep. 765, however, it was held that when the note is barred the mortgage is also barred. The same was held in *Blackwell v. Barnett*, Texas Supreme Court, 21 Alb. L. J. 277.

But some cases draw a distinction between a mortgage and a mere equitable lien. Thus, in *Trotter v. Erwin*, 27 Miss. 772, it was held that the vendor's lien is not a mortgage, but it has merely the incidents of a mortgage, being enforceable in equity against the property subject to the vendor's equitable claim, but it consists solely in debt and must be subject to all the incidents of the debt, and cannot be enforced when the debt cannot be; and so, when a purchase-money note is barred by the statute of limitations the remedy to enforce the equitable lien is also barred. "It is a secret equity and is not recognized as against the rights of a purchaser from the vendee without notice." "It has been held capable of being enforced against the vendee and sub-purchasers with notice by analogy to a mortgage, and upon the general equitable principle that the purchaser should not be entitled to the land until he has paid for it, and not because there was any substantive agreement between the parties that it should be so bound, or that such lien might be enforced against the land." Disapproving *Moreton v. Harrison* and *Lingan v. Henderson*.

The same distinction is drawn in *Borst v. Corey*, 15 N. Y. 505. The court say: "The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and by reason of the seal the debt is presumed not to have been paid until the expiration of twenty years after it becomes due and payable. The six years' limitation has no application to a mortgage. In fact, all instruments under seal are expressly excepted therefrom.

"No action at law can be predicated upon the mortgage to collect the debt secured thereby unless there is contained therein a covenant to pay the debt. A debt secured by deed is said to

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be of a higher nature than one secured by simple contract. On the contrary, the equitable lien is neither created nor evidenced by deed but arises by operation of law and is of no higher nature than the debt which it secures. It must coexist with the debt and cannot survive it. It is true, as claimed by the plaintiff's counsel, that the statute of limitations does not extinguish the debt, it only bars the remedy. But the remedy by action at law is no less barred than that by suit in equity to enforce this lien." "It would be an anomaly if the plaintiff could recover his debt by an action to enforce the lien given to secure the debt, when no action could be sustained to recover the debt directly without reference to the lien. There is no reason why the limitation should be applicable in the one case and not in the other."

MANNING, J., in his dissenting opinion in the principal case, asks: "Upon what principle can a chancellor interfere and establish a lien, when the parties have not contracted for any, and thereby coerce payment of a debt which is barred by a legislative enactment declarative of the policy of the State in favor of repose against delayed litigation?"

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(60 Ala. 313.)

Constitutional law — waiver of exemption from execution.

The right to exemption from execution is a personal privilege which the debtor may waive, and such a waiver in a promissory note is binding upon him.
(See note, p. 44.)

ACTION on a promissory note. The opinion states the case. The defendant had judgment below upon the point in question.

Bragg & Thorington and James Cobbs, for appellants.

Chapman & Smith, contra.

STONE, J. When the note which is the foundation of the present suit was executed — April 8, 1874 — the constitution of 1868, art. xiv., § 1, and the act to "regulate property exempted from sale for the payment of debts," approved April 23, 1873 — Pamph. Acts, 64 — defined the right and measure of exemptions. The language of the constitution is: "The personal property of any resident of this State, to the value of one thousand dollars, to be selected by such resident, shall be exempted from sale on execution, or other final process of any court, issued for the collection of any debt contracted after the adoption of this constitution." The language of the statute is "That the personal property of any resident of this State, to the value of one thousand dollars, to be selected by such resident, shall

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be exempted from levy and sale under execution, or other process for the collection of debt." In *Miller v. Marx*, at December term, 1876, we decided that the exemptions secured under the constitution of 1868 were constitutional legislation, and self-executing. There is no material difference in the clause of the constitution of 1868, and the section of the statute of 1873, copied above.

In the note sued on in this case is the following clause: "And in consideration of supplies furnished, for which this note is given, [I] hereby waive all right to exemptions under the laws of the State of Alabama." The appellant contends that this waiver is valid as to the personal property of the debtor; and this presents the only question in this cause. It will be observed that the words, "to be selected by such resident," are found alike in the constitution and in the statute. The claim and selection must be made by the defendant himself; and if he fails to assert the claim, he thereby forfeits it. *Ross v. Hannah*, 18 Ala. 125; *Gresham v. Walker*, 10 id. 370; *Bell v. Davis*, 42 id. 460. The right to claim personal property as exempt is a mere personal privilege. *Mickles v. Tousley*, 1 Cow. 114; *Earl v. Camp*, 16 Wend. 563; *Smith v. Hill*, 22 Barb. 656; *Dodson's appeal*, 25 Penn. St. 232; *Eberhart's appeal*, 39 id. 509, 513; *Com. v. Boyd*, 56 id. 402.

In *Bowman v. Smiley*, 31 Penn. St. 225, the court said: "Notwithstanding the doubts which have been sometimes expressed, it is now generally conceded that the statutory privilege of the exemption of a portion of his property, from levy and sale under execution, is one which a debtor may waive. When made at the time the debt is created, the waiver is based upon the same consideration as that upon which rests the liability to pay, and is, therefore, irrevocable. Such a waiver is a contract, that, so far as regards the judgment creditor in whose favor it is made, the debt shall be collectible in the same manner as if the act of April 9, 1849, had never been passed."

In *Bibb v. Janney*, 45 Ala. 329, a laborer had drawn an order, or bill of exchange, on his employer, to be paid out of his wages; and the question was, whether this was a waiver of his right to claim this sum due him for wages, as exempt under the statute. This court said: "The drawing of the bill of exchange on Janney, if not an absolute appropriation of the money due by him to the drawer, was, at least, a waiver of its exemption from application to his debts under legal process. Otherwise, it would open a door to fraud, and create distrust, which often would be as damaging to the debtor as

to the creditor. What else can the debtor mean by drawing on his wages, than to declare to the person with whom he deals that he will not assert any existing right he may have to the funds, to the prejudice of his creditor, from whom he is then receiving a valuable equivalent?" And the claim of exemption was disallowed. See, also, Smyth on Exemptions, § 535.

The exemption of personal property, under the provisions of the constitution and statute copied above, is to residents of this State. No other person than such resident is mentioned as having any interest in the exemption. It is manifest that the owner of such exempt personal property can sell, and thus part with such property, and no other person can gainsay his right. When the owner dies, his claim of exemption of personal property is not transmitted, but dies with him. True, if he has a wife or minor child, an independent right of exemption, in some conditions, springs up; but this is a right secured to such wife or minor child, not a continuance of the husband's right. See *Childs v. Jones*, at present term. We think the waiver in the present case must be held valid and binding.

The judgment of the Circuit Court is reversed, and a judgment here rendered, adding to the judgment-entry this clause: "And against this judgment, and the execution to be issued thereon, there is no exemption of personal property of the defendant."

Let the appellee pay the costs of this appeal.

NOTE BY THE REPORTER. — The same doctrine was held by the Iowa Supreme Court in *Angel v. Johnson*, at September term, 1879. The Iowa statute declares that the debtor "may hold, exempt from execution," certain specified property. Held, that to entitle the judgment debtor to insist that property shall not be taken under execution, because the law exempts it, he must claim the exemption at the time of the levy. If he acquiesces, makes no claim, though present, neglects to assert his rights then, and voluntarily surrenders the property, he will be estopped from afterward asserting the exemption. In *State v. Melogue*, 9 Ind. 196, it is said, "the exemption is a personal right, which the debtor may waive or claim at his election." The finding of the referee in *Richards v. Haines*, 30 Iowa, 574, was that "the property seized was delivered to the sheriff by Haines, without making any claim that it was exempt from execution," and it was held that Haines could not afterward insist on such right. The debtor cannot stand by, see and know the levy is about to be made, and afterward claim the exemption. He must, at the time, in some manner, indicate to the officer his purpose to claim the property as exempt. That the exemption is personal there can be no doubt; that it may be waived is equally clear. By making the levy the officer incurs responsibility, and expenses are incurred. This can be avoided if the claim is made before the levy.

But, *contra*, *Moxley v. Ragan*, 10 Bush. 156; *S. C.*, 19 Am. Rep. 61; *Recht v. Kelly*, 82 Ill. 147; *S. C.*, 25 Am. Rep. 301; *Kneettle v. Newcomb*, 22 N. Y. 249. In the last case the court said: "The statutes which allow a debtor, being a householder, and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity, to a limited amount, are based upon views of humanity and policy, which would be frustrated if an agreement, like that contained in these notes, entered into in connection with the principal contract, could be sustained. A few words, contained in any note or obligation, would operate to change the law between those parties, and so far disappoint the intentions of

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the legislature. If effect shall be given to such provisions, it is likely that they will be generally inserted in obligations for small demands, and in that way the policy of the law will be completely overthrown. Every honest man who contracts a debt expects to pay it, and believes he will be able to do so without having his property sold on execution. No one worthy to be trusted would, therefore, be apt to object to a clause subjecting all his property to levy on execution, in case of non-payment. It was against the consequences of this over-confidence, and the readiness of men to make contracts which may deprive them and their families of articles indispensable to their comfort, that the legislature has undertaken to interpose. When a man's last cow is taken on an execution on a judgment rendered upon one of these notes, it is no sufficient answer to say that it was done pursuant to his consent, freely given when he contracted the debt. The law was designed to protect him against his own improvidence in giving such consent."

"In these cases the law seeks to mitigate the consequence of men's thoughtlessness and improvidence; and it does not, I think, allow its policy to be evaded by any language which may be inserted in the contract. It is not always equally careful to shield persons from those acts, which, instead of being promissory in their character and prospective in their operation, take effect immediately. One may turn out his last cow on execution, or may release an equity of redemption, and he will be bound by the act. In thus discriminating, the law takes notice of the readiness with which sanguine and incautious men will make improvident contracts which look to the future for their consummation, when, if the results were to be presently realized, they would not enter into them at all. If with the consequences immediately before them, they will do the act, they will not generally be allowed to retract; it being supposed in such cases, that valid reasons for the transaction may have existed, and that, at all events, the party was not under the influence of the illusion which distance of time creates. Ordinarily, men are held to their executory as well as their executed contracts; but in a few exceptional cases, where the temptation is great, or the consequences peculiarly inconvenient, parties are not allowed to make valid prospective agreements. The present is, in my opinion, one of those cases. Before the passage of the exemption laws, contracts for the payment of money at a future time involved the consequence that all the debtor's property, without exception, might be taken on the execution in case of default. By the statutes exempting certain property, the legislature, in effect, determined that it was inexpedient to allow contracts entailing such results; and this was done by providing that certain property, of limited value, should not be taken. Parties cannot now stipulate that their contracts shall have the same effect as under the former law, for that would be hostile to the policy thus established."

"These exemption laws apply only to householders who have families for which they provide. It is a fair inference, from this feature, that one object of the legislature was to promote the comfort of families, and to protect them against the improvidence of their head. This was so considered by the Supreme Court in *Woodward v. Murray*, 18 John. 400. 'I think it clear,' said Judge PLATT, 'that the legislature meant to confer this privilege on each of those little primary communities called families.' Again, 'it was designed as a protection for poor and destitute families; and the forlorn and destitute condition of his family, in the absence of the husband and father, gave them a peculiar claim to the benefit of the statute.' Some articles are now exempt, which do not enter into the common use of the family as such; but it was supposed that the protection of the team and the implements of a man's trade would be likely to enable him to keep his family together, and to preserve the domestic establishment from want and dispersion. Assuming this to be within the policy of the enactments, it is obvious that a contract, like the one contained in these notes, is subversive of it, and consequently, illegal and void."

"One object of municipal law is to promote the general welfare of society. The exemption laws seek to accomplish this by taking from the head of a family the power to deprive it of certain property by contracting debts which shall enable the creditors to take such property on execution. The parties to this contract sought to set aside those laws, so far as this debt was concerned. This they could not do."

"I do not think it is within the power of parties, by their contracts to give any other effect to judgments and executions than that which the law attributes to them. Could a person, when contracting a debt, agree, for instance, that the act abolishing imprisonment for debt should not apply to any judgment which should be recovered on that contract, or that on such

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judgment there should be no right in the debtor to redeem any land that might be sold under the execution, or that he should not be discharged under any insolvent act? Clearly this could not be done. And upon the same principle, I think, the debtor could not, when contracting the debt, agree that exempt property might be taken on the execution. The law does not permit its process to be used to accomplish ends which its policy forbids, though the parties may, by a prospective contract, agree to such use."

ALBRITTIN V. MAYOR AND ALDERMEN OF HUNTSVILLE.

(60 Ala. 486.)

Municipal corporation — duty to keep streets in repair, when implied.

The duty of a municipal corporation to keep in repair its streets and sidewalks need not be expressly enjoined by statute, but is implied from a statutory grant of power to open, improve, repair and keep them in a safe condition for travel, and to raise the necessary funds by taxation or assessment.*

ACTION for personal injuries caused by a defect in a public street or sidewalk. The opinion states the case. The defendant had judgment below on demurrer.

Walker & Shelby, for appellant.

Brandon & Jones and N. Davis, contra. 1. In the United States there is no common-law obligation resting on corporations to repair highways, streets or bridges, and they are not obliged to do so, except by force of some statute. *Wilson v. Mayor*, 1 Den. 595, 600; *Cole v. Medina*, 27 Barb. 218; *Peck v. Batavia*, 32 id. 634, 643; *Carr v. Northern Liberties*, 35 Penn. St. 324–330; *Smoot v. Mayor of Wetumpka*, 24 Ala. 112; *Shear. & Redf. on Negligence*, §§ 124–128, 346.

2. This doctrine applies to counties also, as to which it has been repeatedly held, that they are not liable to a private action, at the suit of individuals who receive injuries, on account of neglect to keep the roads in repair. *Barbour County v. Brunson*, 36 Ala. 366; *Barbour County v. Horn*, 48 id. 566; *Sims v. Butler County*, 49 id. 110; *Dargan v. Mayor and Aldermen of Mobile*, 31 id. 469; *City Council v. Gilmer*, 33 id. 116; *Fowle v. Alexandria*, 8 Curt. 460;

* To same effect, *Munderschid v. Dubuque* (29 Iowa, 78), 4 Am. Rep. 196; *contra*, *City of Nevada v. Pearce* (46 Tex., 525), 26 Am. Rep. 279; *Detroit v. Blakeby* (21 Mich. 84), 4 Am. Rep. 450.

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Riddle v. Proprietors, etc., 7 Mass. 169-186; *Mower v. Leicester*, 9 id. 247; *Sussex v. Straddler*, 3 Harr. 108; *Detroit v. Blakeby*, 21 Mich. 84, 112; 2 Kent, 274; Dill. Munic. Corp. § 786. As to duties imposed on them, counties stand on the same footing as municipal corporations proper. 24 Ala. 112.

3. Even when the legislature enjoins this duty on corporations, the decisions treat it as a public and not a corporate duty, and they are not liable to be sued civilly for damages, caused by their neglect to perform this duty, unless the action is expressly given by the statute. Dill. on Mun. Corp. §§ 747, 717; *Mower v. Leicester*, 9 Mass. 247; 25 Ala. 461.

4. In the New England States the liability is not implied, but statutory. Dill. Mun. Corp. §§ 747, 748. These statutes impose on towns the duty to make their ways safe and convenient, and give an action for injuries caused to person or property by any defect or want of repair.

5. A municipal corporation is not liable to a private action for negligence in the performance of its duties, unless the duties imposed are imperative. *Smoot v. Mayor of Wetumpka*, 24 Ala. 112; *Cole v. Medina*, 27 Barb. 218; *Peck v. Batavia*, 32 id. 634; *Carr v. Northern Liberties*, 35 Penn. St. 324.

6. There is a marked difference between the New England statutes, the Alabama statute and the charter of Huntsville. In New England, the statutes impose the duty on towns. In Alabama, the county commissioners are vested with a discretion in the premises. The charter of Huntsville does not impose any duty on the city, except to collect a street tax, and confers on the authorities power to allow parties, who are amenable to such a tax, to discharge it by working on the streets, and to require that taxes collected in new portions of the city be appropriated to the benefit of those portions; and these duties are not imposed in imperative terms, but only in terms which confer a discretion. Charter of Huntsville, §§ 22, 23; Code of City Laws, §§ 67, 91, 143-148.

MANNING, J. This suit was brought by appellant, for damages for the wounds, suffering, loss of time and expense, to which he was subjected, by a fall of about six feet, in the night-time, while walking in one of the public streets of Huntsville, down a precipice, or walled place, the upper part of which was on a level with the street or foot pavement on the side thereof, and without a railing or other

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barrier, or any light burning near it, to prevent persons who, like him, did not know of its existence, or should not see it, from being precipitated down the descent. By the fall, it is alleged, appellant's leg was broken and had to be afterwards amputated; from which, and the bruises he received, resulted great pain, sickness, long confinement and expense, and also the inability and injury of being a cripple for life. It is alleged that it was defendant's duty to have had such railing, barriers or other safeguards, erected along said precipice to prevent accidents thereby; that it had existed in the dangerous condition it was then in for a year or more before appellant's fall; and that notwithstanding its knowledge of such a condition, defendant negligently failed and omitted to perform said duty, or otherwise to cause the dangerous nuisance to be abated. This is the substance of the complaint.

The charter of a municipal corporation is a public act, of which the courts take judicial notice, without any recital of its provisions in the pleadings. *Smoot v. Wetumpka*, 24 Ala. 121; *Case v. Mayor of Mobile*, 30 id. 538; *Perryman v. Greenville*, 51 id. 510.

In March, 1870, a statute was passed, entitled "An act to establish a new charter for the city of Huntsville." The name given to the corporation is: "The Mayor and Aldermen of the City of Huntsville." According to section 2, "the corporate limits * * * embrace an area of land two miles square, whose center shall be the center of the public square in said city," etc. Section 4 provides, "that the government of said corporation shall consist of, and its corporate power shall be exercised by, a mayor and eight aldermen, who shall be elected," etc.; and section 17 enacts (among many other important provisions), that they "shall have power and authority to declare, prevent and remove nuisances; * * * to erect and repair bridges; to construct drains and sewers and keep them in repair; * * * to keep in repair the streets, avenues and alleys of said city; to discontinue and close them when expedient; to widen or change their direction and open new ones; * * * to pave, grade, macadamize, or otherwise improve any street, or part thereof; to provide the means therefor, if deemed expedient and proper, by assessments on the owners of property to be benefited thereby, or by assessment on the property to be benefited, and to collect and enforce such assessments as other taxes; * * * to provide for the punishment, by fine, or fine and imprisonment, or by imprisonment, or by work on the streets, or

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other work of the city, of any breach of the laws, by-laws, ordinances of the corporation; * * * and to pass all such laws, by-laws and ordinances, as may be necessary or proper to execute the powers in this charter granted, as may be expedient for good government of the city." Acts 1869-1870, 412.

These and many other provisions in the charter show that Huntsville was a city of consequence, and that it was endowed as such with ample powers and faculties, and an organization for the exercise of them, by which it was designed to make this city, in a very large degree, independent in its internal administration of State and county officials. Was it so charged by this legislation with the duty of keeping the streets in order as to be liable to appellant for the consequences of the accident to him? The circuit judge was of the opinion that it was not. He sustained the demurrer to the complaint, not on the ground that its averments were defective, but as the judgment-entry recites, "because there is no duty imposed upon the defendant to keep the streets of said city in repair, or to put up guards or barriers, in cases and under circumstances, as alleged in the complaint." We shall not, therefore, scrutinize the counts in the complaint to see whether or not they could be made better by amendment. The declaration in *Snoot v. Wetumpka*, 24 Ala. 116, might be advantageously consulted in the preparation of such a complaint.

Probably it was under the influence of the case just referred to that the circuit judge reached the conclusion that the city was not liable in the present cause. The particular duty of keeping the streets in repair was enjoined on the municipal authorities of *Wetumpka* in express terms. Ample authority to raise the means of doing so was conferred upon them, while the inhabitants of the town were at the same time expressly exempted from working on the public roads of the county. Some stress was laid by the court on these facts, and the case did not require more to be said than the court did say, to wit: "Where a particular duty is positively enjoined and no discretion is vested in the corporation as to whether it will or will not perform it, * * * and having the means for performing this duty the corporation willfully or negligently fails to perform it, in consequence of which failure an extraordinary injury happens to an individual, we see no reason why an action will not lie as well against it as against an individual for a similar omission of duty that works an injury to another." 24 Ala. 121.

But the court did not say that it was only in such a case that a

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municipal corporation would be liable to one so injured. The subject has been studied and the judicial decisions in respect to it examined, and the results expressed in carefully considered language by Judge DILLON in his excellent work on Municipal Corporations. After showing that the same law is not applicable to counties and their subdivisions, called in New England "towns," and like *quasi* corporations, he says (§ 789): "It may be fairly deduced, from the many cases on this subject referred to in the notes, that, in the absence of an express statute imposing the duty and declaring the liability, *municipal corporations proper*, having the powers ordinarily conferred upon them respecting bridges, streets and sidewalks within their limits, owe to the public the duty to keep them in a safe condition for use in the usual mode by travelers, and are liable in a civil action for special injuries resulting from neglect to perform this duty. Such a duty and liability are considered to exist without a positive statute when the following conditions concur: 1. The place in question, whether bridge, sidewalk or street, must be one *which it is the duty of the corporation to repair or keep in a safe condition*; and this *duty* (to keep in repair), if not specifically enjoined, must arise upon a just construction of the charter or statutes applicable to the corporation. 2. This duty or burden must appear, upon a fair view of the charter or statutes, to be imposed or rest upon the *municipal corporation as such*, and not upon it as an agency of the State or upon its officers as independent public officers. (This, however, in general, appears sufficiently when the municipality sought to be made liable exists under a special charter or general act which confers upon it peculiar powers and privileges as respects streets, their control and improvement, not possessed throughout the State at large under the general enactments concerning ways.) 3. The *power to perform the duty* of maintaining the streets in a safe condition by authority to levy taxes or impose local assessments for the purpose, must be (as it almost always is) conferred upon the corporation. * * * Where the duty to repair is not specifically enjoined, and an action for damages caused by defective streets is not expressly given, still both the duty and liability, if there be nothing in the charter or legislation to negative the inference, has often and in our judgment, properly been deduced from special powers conferred upon the corporation to open, grade, improve and *exclusively control* public streets within their limits, and from the means which by taxation and local assessments, or

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both, the law places at its disposal to enable it to discharge this duty."

These long extracts are made because of the evident pains taken by the learned author to state the doctrine, which is the result of the decisions on the subject in its exact extent and with its just qualifications, in words selected with a judicial care for accuracy.

In the case of *Chicago v. Robbins*, 2 Black, 422, in the Supreme Court of the United States, it is said: "It is well settled that a municipal corporation having the exclusive care and control of the streets is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that may be dangerous; and if this plain duty is neglected and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrong-doer." This was a case in which, also, a person was injured by a fall that might have been prevented if railings had been put up by the property holder who had caused the excavation to be made.

It is quite plain, upon examining the provisions of the charter of Huntsville in the light of the law as above set forth, that the city is liable for all the damages sustained by appellant if the precipice referred to had existed in its unguarded and dangerous condition, within observation by the people generally, for such length of time as must have enabled it to be known, and appellant did not bring the disaster upon himself by his own culpable negligence in not avoiding an obvious peril.

The circuit judge erred in his ruling sustaining the demurrer and the judgment must be reversed and the cause remanded.

BERNSTEIN V. HUMES.

(60 Ala. 582.)

Deed of lands held adversely without color of title — voluntary conveyance.

A conveyance of lands held adversely, under claim of ownership, though without color of title, is void as against the holder, and this applies to a voluntary conveyance by a purchaser on execution sale.

ACTION to recover real estate. The opinion sufficiently states the case. The charges asked, and referred to in the opinion, were as follows :

“4. Before the plaintiffs can recover in this action they must prove, that at the time Walker made the deed to them, he, Walker, was in the possession of the lot, claiming the same, or exercising acts of ownership over it ; and if plaintiffs have failed to prove this, you must find for the defendant.

“5. If you find from the evidence, that at the time the marshal sold the lot to Walker, Bernstein was in the possession of the lot, either himself or by his tenant, claiming title, Walker did not purchase a perfect legal title, but only a right of property which could be reduced to possession by action, and Walker could not convey a title to plaintiffs unless he reduced the lot to possession before making deed.

“7. If at the time Walker purchased the lot sued for at the marshal's sale, Bernstein, either by himself or tenant, was in possession of the lot, exercising acts of ownership over it, and claiming it as the property of Bernstein, then Walker, did not purchase a perfect title but only a right of property which could be reduced to possession ; and if Walker conveyed the lot to the plaintiffs while it was in the possession of Bernstein, or his tenant, the deed is void as to Bernstein, and you must find for the defendant.

“8. If Bernstein, either by himself or his tenant, was in the possession of the lot sued for, claiming as Bernstein's property and exercising acts of ownership over it at the time the marshal sold it to Walker, and continued such possession up to and subsequent to the time Walker conveyed the property to the plaintiffs in this suit, then the deed of Walker is void as to Bernstein, and you must find for the defendant.

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"9. If at the time Walker purchased the lot sued for at the marshal's sale, Bernstein, either by himself or tenant, was in possession of said lot, asserting *bona fide* claim of title to said lot and exercising acts of ownership over it, and continued such possession until the commencement of this suit, and Walker conveyed said lot to plaintiffs without reducing the lot to possession, the deed is void as to Bernstein, and the plaintiffs cannot recover in this suit."

Brandon & Jones, for appellant.

Humes & Gordon, contra.

STONE, J. (Omitting other matters.)

It is contended that the present action cannot be maintained, because plaintiffs' deed from Walker — the title they rely on — was executed while the lots in controversy were adversely held and occupied by defendant, under claim of right. Charges 4, 5, 7, 8 and 9, seek to raise this question. It is fairly presented in the last four, if the facts of this case justify the application of the principle. The admitted facts on which this question arises, are — that Walker purchased, at the marshal's sale, not for himself or in his own right, but in trust for Mrs. Chapman, mother of the plaintiffs. The money and means with which the purchase was made, were furnished by Reuben Chapman, her husband, and the title was made to Walker, in trust for Mrs. Chapman, at the request of Mr. Chapman. Walker neither paid, nor incurred liability to pay, any money; and the record fails to inform us for what purpose the title was taken in him, instead of Mrs. Chapman. Mrs. Chapman soon afterwards died, leaving the title in Walker; and soon after this Walker conveyed, by quit-claim, all the interest he had in the lands, to the plaintiffs, reciting, substantially, the above facts, and that the title was conveyed to the heirs of Mrs. Chapman, at the request of Reuben Chapman, and the said Reuben indorsed on the deed his written assent to such conveyance. This conveyance, it is alleged, is obnoxious to the charge of maintenance, and therefore, inoperative to convey the title. The testimony tends to show, that at the time this conveyance was made, Bernstein, by his tenant, was in possession of the land sued for, and asserted ownership and dominion over it; and it is contended that the conveyance was nothing more than a transfer of a right to sue, and therefore, it will not support an action.

Against this view it is answered, that Walker had no interest in the premises — held the title in the nature of a naked trust; was compellable in equity to convey the title to Mrs. Chapman, his *cestui que trust*; that in conveying title to her heirs-at-law, she being dead, he voluntarily did only what equity would have compelled him to do; that equity approves and regards as well done, that which ought to have been done; and that therefore this conveyance does not fall within the influence of the rule against maintenance. To this it is replied that, by the death of Mrs. Chapman — intestate, so far as we know — Reuben Chapman, her surviving husband, became entitled to a life estate in the premises in controversy; and that the deed of Walker to plaintiffs, made as it was by the “written request,” and under the “instruction and direction” of Reuben Chapman indorsed on the deed, is more than a mere execution of what equity would have compelled him to do; that it is a conveyance to them of the life estate of said Chapman which they did not previously own, either legally or equitably, and that therefore the deed was but a transfer of a right to recover the property by suit which has all the qualities of maintenance.

The question we are required to decide is founded on a very ancient doctrine, partly common law and partly statutory. In Coke upon Littleton, 369 a, it is said “that feoffments made for maintenance shall be holden for none and of no value, so as Littleton putteth his case at the common law; * * * but some have said the feoffment is not void between the feoffer and feoffee but to him that hath right.” This author adds, speaking of the statute of 32 Henry 8, ch. 9: “Since Littleton wrote, there is a notable statute made in suppression of the causes of unlawful maintenance (which is the most dangerous enemy that justice hath), the effect of which statute is, first, that no person shall bargain, buy or sell or obtain any pretended rights or titles; secondly, or take, promise, grant or covenant to have any right or title of any person, in or to any lands, tenements or hereditaments; but if such person which so shall bargain, etc., their ancestors, or they by whom he or they claim the same, have been in possession of the same or of the reversion or remainder thereof, or taken the rents or profits thereof by the space of one whole year, etc., upon pain to forfeit the whole value of the lands, etc., and the buyer or taker, etc., knowing the same to forfeit also the value; thirdly, provided that it shall be lawful for any person being in lawful possession by taking of the yearly farm, rents

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or profits, to obtain and get the pretended right or title, etc., of any lands whereof he or they shall be in lawful possession." So, in Cro. Eliz. 445, *Upton v. Bassett*, the court said: "A feoffment upon maintenance or champerty is not void against the feoffer but against him who hath right."

It is manifest that this doctrine of the common law, emphasized and made more efficient by statute, had its origin in the feudal times when feudal barons exercised power and authority over their vassals and over the machinery of civil government only subordinate to the will of an arbitrary king. The necessity for such legislation does not exist in this country of free constitutions as it did in England when the haughty feudal lords governed within their sub-dominions with despotic rule, and frequently made war, and often successfully, upon their own sovereigns. Hence the forfeitures and the denial of the right to aid a suitor by money or advice in prosecution or defense of his rights have never been engrafted on our jurisprudence. But two of the principles of the common law and English statute, noted above, have been adjudged to be of force in this State: First, champerty, not necessary to be considered here (see 1 Brick. Dig. 334); second, a denial of the right to sell or buy real or personal property, the right to which exists only in action and to maintain a suit in the name of the purchaser. This is treated as a species of maintenance and is everywhere adjudged to be a complete bar to a suit by the purchaser to recover such property or damages for tortious injuries done to it. Damages caused by torts cannot, in the ordinary acceptation of the term, be the subject of private bargain and sale.

In *Pryor v. Butler*, 9 Ala. 418, this court said: "The right acquired by Bullard, who purchased at the sale made under the mortgage, was a right to recover the lot by suit if the possession was in another and the possession was withheld. This right to sue he could not transfer to another. It is an ancient doctrine of the common law that nothing which lies in action, entry or re-entry can be granted over." To the same effect, see *Dexter v. Nelson*, 6 Ala. 68; *Abercrombie v. Baldwin*, 15 id. 363; *Abernathy v. Boazman*, 24 id. 189; *David v. Shepard*, 40 id. 587; *Hines v. Chancey*, 47 id. 637; see, also, this point in *Coleman v. Hair*, 22 Ala. 596; see, also, *Gibson v. Shearer*, 1 Mur. 114; *Hadley v. Geiger*, 4 Halst. 225; *Williams v. Hogan*, Meigs, Tenn. 187; *Allen v. Smith*, 1 Leigh, 231; *Martin v. Pace*, 6 Blackf. 99; *Dubois v. Marshall*, 3 Dana, 336; *Jackson v. Demont*, 9 Johns. 55; *Van Hoesen v. Benham*, 15 Wend. 164; Rawle on Cove-

nants, 65. And it is settled in this State that to avoid a deed thus made by one out of possession, it is enough if there be one in adverse possession exercising acts of ownership and claiming to be rightfully in possession. Color of title is not necessary. On the subject of transfer of mere rights to sue, see 1 Chitty's Pl. 17, 66; 1 Add. on Cont. § 257.

In Tyler on Ejectment, commencing at page 935, is a pretty full discussion of this doctrine. He states it as "a general rule of the common law that a conveyance of land by a person, against whom it was adversely held at the time of making it, is absolutely void; and the reason of this rule, according to an ancient authority, is 'for avoiding of maintenance, suppression of right and stirring up of suits,' and therefore, nothing in action, entry or re-entry, can be granted over." *Absolutely void* is too strong a phrase. Such conveyance is good and binding, at least by way of estoppel, between the parties. The same author remarks, citing many authorities, that "so far as the law declares that a conveyance by a person out of possession, where the land is held adversely to the grantor, is void, the rule is quite generally recognized in all the American States."

In White & Tudor's Leading Cases, 4th Am. ed., vol. 2, part 2, page 1631, is a very full discussion of the doctrine, English and American. It is there said: "The rule, that land held adversely shall not be granted, was too deeply fixed in the common law to yield to the novel doctrine, that rights of action are not less objects of commerce than rights attended with possession; and the assignment of a right of entry, or a contract made in consideration of such transfer, is still, in many of the States, invalid." The annotators cite many authorities in support of this proposition, and among others, *Poe v. Davis*, 29 Ala. 676; an opinion by Chief Justice CHILTON, in which he places the doctrine against champerty and maintenance on very elevated ground. Among other strong expressions found in Ch. J. CHILTON's opinion, is the following, quoted from Lord ABINGER, in *Prosser v. Edwards*, 1 Younge & Col. 484: "All our cases of maintenance and champerty are founded on the principle that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." Commenting on a relaxation of the doctrine which will be found referred to in Tyler on Ejectment, and White & Tudor's Leading Cases, *supra*, Ch. J. CHILTON said: "Some of the recent cases do, indeed, relax the rules which have heretofore

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obtained; but we apprehend, when fully considered, they do not go the length of breaking down the barrier which the wisdom of ages has erected against the perversion of the cause of justice by opening a door for strangers to come in and interfere in suits in which they have no interest aside from the agreement they may make to maintain them."

The language of the New York statute is: "Every grant of lands shall be absolutely void, if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor." It will be observed that, under this statute, the adverse holding, to avoid a conveyance made by one out of possession, must be *under a title*. Adverse holding under claim of ownership is not enough. The claim, to avail, must be under some specific title. Under this statute, the rulings in that State have somewhat relaxed the rule. See *Crary v. Goodman*, 22 N. Y. 170; *Laverty v. Moore*, 33 id. 658; *Livingston v. Peru Iron Co.*, 9 Wend. 511. In *Requa v. Holmes*, 26 N. Y. 338, and *Thalhimer v. Brinckerhoff*, 3 Cow. 623, the relaxation of the rule is carried to a doubtful length. Our rulings have been steadfast and uniform, and have maintained, throughout, that there can be no action maintained by a transferee of the title, against one in possession, claiming adversely, at the time of the transfer. The principle, with us, rests on the common law, and does not require that the adverse holder shall claim under a specific title; sufficient that he is in possession, asserts the right to retain the possession, and that his claim is adverse to that of plaintiff's grantor.

It will be observed, in the many cases on this question, we do not encounter the expressions *vendor*, or *purchaser*, except in contradistinction to a transmission of title by descent. The latter change of title is effected by the law and does not fall within the rule. Conveyance, grant, deed, transfer; these are the words we meet with. The right to sue cannot be conveyed, transferred or granted to another, is the language of the courts. Such is the language employed in our adjudged cases.

In the case of *Clay v. Wyatt*, 6 J. J. Marsh. 583, Green Clay, in consideration of \$100, and natural love and affection, conveyed to his sons various tracts of land. Part of the land so conveyed was, at the time, in the adverse possession of Wyatt, against whom an action of ejectment was instituted, by the sons. The court said: "That the deed is void, so far as it may operate upon the land in

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the adverse possession of Wyatt, according to the literal meaning of the act, is too plain to admit of any doubt. But it is contended, that such a deed as the present, being obviously intended by the grantor for the advancement of his children, does not come within the spirit of the act, and that the legislature used the word purchase in its popular, and not in its technical sense; wherefore it is insisted that the deed is not void. The principal object of the legislature, in passing the act in question, was to protect the occupants of land. A father might have claims which he would be unwilling to litigate in his own name, because of his liability for costs, and which he would willingly transfer to a son, a nephew or a cousin, in consideration of natural love, and afford him an opportunity to profit by the litigation. Such a transaction would tend to defeat the main object of the legislature, which was to throw obstacles in the way of asserting doubtful rights, to the prejudice of occupants; and hence we think the policy of the act includes voluntary conveyances, as well as those founded on valuable considerations." This asserts a sound rule, and gives sound reasons in support of it.

In the present record, according to the agreed facts, at the death of Mrs. Chapman, Mr. Chapman, her husband, became entitled to a life estate in the property in controversy. The conveyance by Walker to the plaintiffs, made by the procurement and direction of Chapman, is the equivalent of a conveyance, by the latter, of a life estate in the premises, for that was the *quantum* of his interest. That life estate, so long as Chapman lived, was the only right, outside of Walker, the trustee, which could litigate, at the time, the right to the property. That right, and the legal title transferred to them by Walker's deed, constitute plaintiffs' sole right to maintain this suit. These being the facts, if at the time Walker made his deed, Bernstein, or his tenant, was in adverse possession, claiming right to such possession, then plaintiffs cannot maintain this suit. The eighth charge asked should have been given.

For the single error above pointed out, the judgment of the Circuit Court is reversed, and the cause is remanded.

[Omitting a minor remark.]

BRICKELL, C. J., not sitting, having been of counsel.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

PEOPLE v. ABBOTT.

(33 Cal. 284.)

Criminal law — larceny of check.

A broker, who had been accustomed to buy silver on account of a bank, was instructed by the bank to make a certain purchase of silver on its account, and as he had no funds, the bank certified his check drawn on the bank, and delivered it to him. He did not buy the silver, but used the check for his own purposes. *Held*, that, if he received the check with the intention of so appropriating it, he was guilty of larceny.

CONVICTION of grand larceny. The opinion states the facts.

D. J. Murphy, for appellant.

Geo. B. Merrill, for respondent.

WALLACE, C. J. The prisoner having been found guilty by the jury of the offense of grand larceny, in stealing a certified check, alleged in the indictment to have been the property of "The Anglo-California Bank (Limited)," a corporation existing and doing business in that name, was awarded a new trial by the court below, and this appeal is prosecuted by the people from the order granting the new trial.

The motion was based upon many grounds, but a careful examination of the record discloses that, with the exception of the one

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which will be presently considered, none of them find any support in point of law or fact, and they will not, therefore, be further noticed.

The indictment alleges that the prisoner did feloniously steal, take, and carry away a certain written instrument, the property of the bank, which written instrument was in the words and figures following :

“No. 284.]

SAN FRANCISCO, *February* 19, 1878.

“The Anglo-California Bank (Limited) — Pay to cash, or bearer, twenty thousand dollars (\$20,000), gold.

“GEO. W. ABBOTT.

“Certified February 19, 1878. G. GRANT, *Teller.*”

And the principal point made at bar, and upon which it is understood that the court below granted the new trial, is that it did not sufficiently appear at the trial that the instrument set forth in the indictment, as the subject of the larceny, was the property of the Anglo-California Bank

The circumstances shown at the trial were, that on the day of the date of the instrument set forth in the indictment, the prisoner, who had been accustomed, for some two years next theretofore, to act as the broker of the Anglo-California Bank in the purchase of silver for its use in its business, stated to the cashier of the bank that he, the prisoner, could buy a certain amount — some \$20,000 — of silver from the firm of Hodge & Co., and was thereupon instructed by the cashier to make the purchase. For the purpose of providing the money to be used by the prisoner in effecting the transaction, the prisoner immediately drew the check set forth in the indictment, which was thereupon *certified* by the bank in the usual form, and delivered to the prisoner, who took it away with him, for the ostensible purpose, upon his part, of using it in the proposed purchase of silver for the bank; but on the same day he used it in a purchase upon his own account from the Nevada Bank, of some \$20,000 and upwards in currency. The prisoner thereupon fled the country with the proceeds, or most of the proceeds of the check, being the currency so purchased by him, but was subsequently arrested at Acapulco and returned to this State. The Nevada Bank subsequently demanded and received from the Anglo-California Bank the amount of the check in due course.

It may be conceded, as claimed for the prisoner, that a mere check

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drawn against the funds of the drawer is not the subject of larceny by the latter; for while it remains in his hands, it is his property. If the check be found in the hands of the bank, it is presumptively to be considered as having been paid out of the funds of the drawer previously deposited with the bank. If it however be an overdraft, or its payment an advance made by the bank to the drawer, the bank may show that fact. In either case, the check may be said to be the property of the drawer. In the former case the bank has the right to retain the possession of the check until it has obtained, in some way, the acknowledgment of the drawer that the bank has rightfully paid the amount out of the fund of the drawer on deposit with the bank. This is ordinarily effected by the balancing of the bank book of the drawer—which constitutes a statement of the drawer's account with the bank—when the check is usually returned to the drawer. In the latter case—that is, when the check represents an overdraft—the bank may rightfully retain the check in its possession, as part of the evidence of its claim against the drawer for repayment, until the indebtedness is discharged. But we think that it cannot be maintained that the check mentioned in the indictment was, in any sense, the property of the prisoner. When it was appropriated by the prisoner, it bore upon its face the acceptance of the bank upon which it had been drawn. This acceptance amounted to an unconditional undertaking upon the part of the bank to pay to the holder the sum named in the check. It amounted, in this form, to an absolute promise upon the part of the bank—the acceptor—to pay to the holder, irrespective of the actual condition of the drawer's account with the bank. This is the rule by which the rights of an innocent holder of the certified check would be determined. But as between the accepting bank and the prisoner in this case, the certified check did not create such an obligation in favor of the latter, nor any obligation to pay to him, or on his account, or for his benefit. The check had not been drawn against the funds of the prisoner in the bank (he had none), nor was it an overdraft, or intended by the parties as an advance to the prisoner; it was, in effect, merely a check drawn by the bank upon itself for its own business purposes, and intrusted by it to the prisoner, to be applied to those purposes. As between the prisoner and the bank, the certified check, while it remained in the hands of the prisoner, was, therefore, the property of the bank only—as much so as if it had been in the hands of its messenger, or other servant or

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employee, who had been intrusted with it by the bank for a designated purpose. In such a case, if the servant or employee should take the custody of the accepted check, *animo furandi*, the taking would amount to a larceny of the property of the bank within the intent of the statute, and to this effect the jury were correctly instructed by the learned judge of the court below. Under this instruction, the jury found the prisoner guilty; and the circumstances appearing at the trial, wholly uncontradicted, fully support the verdict.

The order awarding a new trial is, therefore, reversed, and the cause remanded to the court below, with directions to proceed to judgment on the verdict.

FARMERS AND MERCHANTS' BANK v. DOWNEY.

(53 Cal. 468.)

Corporation — act of director on behalf of, but for his own profit.

A director of a bank loaned the moneys of the bank on a note running to the bank at a stipulated rate of interest, but on a secret agreement with the borrowers that he should participate in the profits of lands to be purchased with the moneys. *Held*, that he was bound to surrender those acquired profits to the bank.

ACTION to charge the defendant as trustee. The opinion states the facts. The plaintiff had judgment below.

Brunson, Eastman & Graves and John R. McConnell, for appellant.

Glassell, Chapman & Smiths and Thom & Ross, for respondent.

WALLACE, C. J. The complaint filed in this action seeks to charge the defendant John G. Downey, as trustee of the plaintiff, touching the benefits secured to the defendant by the terms of a certain contract between the latter and Melchert and Linderfeldt.

The circumstances appearing are that these persons had purchased the "Wilhart Tract" of land situate in the city of Los Angeles, upon which they had payments to make. They had also agreed to sell a portion of the same tract to the "Pioneer Building Lot Association of East Los Angeles" at a considerable advance upon the price they

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had agreed to pay to the Wilharts. In order to provide themselves with money to pay to the Wilharts they applied to Childs, who was one of the directors of the banking corporation, plaintiff here, but without success. At the instance of Melchert and Lindenfeldt, Childs brought the matter to the attention of the defendant, who was another director of the banking corporation, plaintiff here, and at the time acting as its president, and these two agreed to furnish the sum required upon condition that they should become personally interested in the sale to be made to the Pioneer Building Lot Association to the extent of one-third of the net profits. The loan was accordingly made and a note therefor taken, bearing interest at the rate of one and one-quarter per cent per month running on its face to the bank, and executed by Melchert and Lindenfeldt as makers. The bank subsequently, and upon ascertaining the existence of this agreement, claimed to be entitled to its benefits and demanded of Childs and the defendant Downey that they assign to it the agreement and all benefits derived or to be derived thereunder.

Childs complied with the demand and executed the required assignment but the defendant refused, whereupon this action was brought. The court below gave judgment for the plaintiff in accordance with the prayer of the complaint, from which judgment, and from an order subsequently entered denying his motion for a new trial, the defendant has brought this appeal.

The controversy between the parties involves the right to the one-sixth of the profits of the land transaction already referred to. These profits constitute the bonus which the defendant attempted to secure to himself, to the exclusion of the other stockholders, in making the loan of the money of the bank.

Upon well-settled principles governing courts of equity the defendant cannot be permitted to retain these profits for himself. They constitute part of the consideration which the borrowers paid, or agreed to pay, in obtaining the loan, and are as clearly the property of the corporation as is the interest accrued and stipulated to be paid on the face of the note itself. In making the loan the defendant was acting as a director—the president—of the corporation, plaintiff here. He was its *trustee*. “The officers and directors of a corporate body * * * are trustees of the stockholders, and cannot, without being guilty of fraud, secure to themselves advantages not common to the latter.” Bigelow on Fraud, 248, and cases cited in note.

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This is the well-settled rule and the general language of the authorities. In *Kohler v. Black River Falls Iron Company*, 2 Black, 721, the Supreme Court of the United States say: "The directors are the trustees or managing partners, and the stockholders are the *cestuis que trust* and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of a court of equity, be suffered to pass without a remedy."

The law will not permit them to make a private profit for themselves in the discharge of their official duties; and as observed by the Court of Appeals of the State of New York, in *Bow v. Brown*, 56 N. Y. 288, "when agents and others acting in a fiduciary capacity understand that these rules will be rigidly enforced, even without proof of actual fraud, the honest will keep clear of all dealings falling within their prohibition, and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it."

Judgment and order affirmed.

Mr. Justice CROCKETT expressed no opinion.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

MAJORS v. EVERTON.

(89 Ill. 56.)

Marriage — deed from husband to wife.

A voluntary deed from husband to wife, will be upheld as against the husband's heirs, where the gift is a reasonable provision for the wife.*

BILL for partition and assignment of dower. The opinion states the case.

B. B. Smith, for plaintiff in error.

Rufus Cope, for defendants in error.

SHELDON, J. This was a bill in equity, on the chancery side of the Circuit Court of Clay county, for the partition and assignment of dower in some sixty acres of land.

The bill charges, that in May, 1874, William Howe died intestate, seized of the lands; that he left Rebecca Howe (now Rebecca Majors), his widow, who is entitled to dower in the lands, also six children and a grandchild, Eugene Hicks; that said children were each entitled to one-seventh of the lands; that since the death of William Howe, five of the children conveyed all of their interest in the lands.

*To same effect, *Sims v. Roberts* (35 Ind. 181), 9 Am. Rep. 679; *Sayres v. Wall* (25 Gratt. 284), 31 Am. Rep. 308.

to the other child, Rebecca Everton, who now owns the undivided six-sevenths, and Eugene Hicks the undivided one-seventh of the lands, subject to the dower of the said Rebecca Majors. The said Rebecca Everton and Eugene Hicks are the complainants, and Rebecca Majors the defendant, in the bill.

The bill charges, further, that William Howe, in his lifetime, made a deed to his wife, Rebecca Howe (now Rebecca Majors), conveying to her the lands; that the deed was without consideration, and void, being executed by the said William to his wife, and that she claims to own the lands in fee, under the deed; that said William Howe bought the lands with funds derived from the estate of Pauline Harrison, his daughter, and sister of Rebecca Everton; that said Pauline Harrison died in 1870, and on her death-bed made the request that her property should not be permitted to pass to Rebecca Majors; that said Rebecca Majors now occupies a homestead worth \$1,200, purchased with the money of said William Howe, and conveyed to her, to which complainants make no claim.

The prayer of the bill is for partition of the lands between the complainants, and the assignment of her dower to the said Rebecca Majors.

The Circuit Court, on final hearing upon bill, answer, replication and evidence, decreed that the deed to Rebecca Majors was void, that she was entitled to dower in the land, and that the complainants owned the land, as claimed in the bill, subject to the dower, and ordered the assignment of dower to the defendant, and partition between the complainants as found entitled by the decree. Defendant brings this writ of error.

The answer admits that the only consideration of the deed from William Howe to the defendant, his wife, was love and affection for her.

Such a deed from husband to wife is not necessarily void in equity. On the contrary, courts of equity not unfrequently uphold such deeds. *Dale v. Lincoln*, 62 Ill. 22, is a case where such a deed was sustained in equity against the claim of a grantee of the heirs of the husband; and 2 Story's Eq. Jur. § 1374; *Shepard v. Shepard*, 7 Johns. Cr. 57; *Jones v. Obenstrain*, 10 Gratt. 259; *Hunt v. Johnson*, 44 N. Y. 27; S. C., 4 Am. Rep. 631, were referred to as authorities supporting the decision.

The gift, here, was but a reasonable provision for the wife. The proof fails to show that the land was bought by Howe with funds

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derived from the estate of Pauline Harrison, in any sense that would charge it with the character of a trust. The only claim here involved, as against the deed, being that of the heirs at law of the husband, we see no sufficient reason why a court of equity should interpose and set aside the deed; but we view it as a case where the deed should be upheld in equity.

The decree will be reversed, and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

BRADFORD V. ABEND.

(89 Ill. 78.)

Marriage — divorce — on suit of insane wife by fraud of husband.

A divorce was granted in a suit brought in the name of an insane wife, in confinement in an asylum in another State. On a bill filed on her behalf to set aside the divorce, alleging that it was procured by the fraud of the husband, *held*, that, whether there was fraud, in fact or not, the law would presume fraud, and set aside such a divorce, no matter by whose advice it was obtained.*

BILL to set aside a divorce. The opinion states the facts. The plaintiff prevailed below.

J. M. Hamill, for appellant.

G. A. Koerner, for appellee.

SCOTT, J. In 1835, Ann M. Bradford, then of sound mind, was married to George A. Bradford, and lived many years with him as his wife. Among the principal allegations of the present bill, are that, in 1853, on account of sickness, both mental and physical, superinduced by cruelty and neglect on the part of her husband, she became insane, and has ever since so remained; and having been abandoned by her husband, she was, by her friends, placed in a hospital for the insane in St. Louis, for care and treatment; that afterwards, on the 20th of September, 1858, while she was so confined in the asylum, and wholly incapable of comprehending any

* To same effect, *Newcomb's Exrs. v. Newcomb* (13 Bush. 544), 26 Am. Rep. 222.

business, as the charge is, a bill was filed for divorce, in the name of the insane wife, in the Circuit Court of St. Clair county, against her husband, on the ground of desertion, and without waiting to have process issued and served upon him, defendant, on the same day, caused his appearance to be entered, and having answered the bill, and there being no replication, the cause was at once heard, and a decree of divorce rendered.

The bill also contains an allegation the divorce was obtained by fraud on the part of defendant to rid himself of his wife, on account of the misfortunes that had overtaken her. The facts relied upon as showing the collusion and fraud insisted upon are, that the bill was filed in the name of the wife, when she was insane and confined in an asylum in another State, incapacitated, on account of her mental condition, to comprehend such proceedings, had they been communicated to her; and that on the same day, perhaps as a part of the same transaction, although defendant himself then resided out of this State, his appearance was entered, his answer filed, the cause heard and a decree of divorce pronounced.

Without commenting on that branch of the case, as it appears all persons alleged to have been most active in the matter have since deceased, the decision may be placed on the single ground, the wife was insane when the bill was filed, and incapable, by reason of her affliction, to give any consent to the filing of the bill, and that this fact was well known to defendant. That she was insane at the time, and was confined in an asylum for the insane in another State on the very day the proceedings in divorce were had in the courts of this State, admits of no doubt. [Omitting comments on the testimony.]

Our conclusion is the relief granted by the court below is warranted both by the law and the evidence. As we have seen the bill was filed in the name of the insane wife against her husband for divorce while she was in close confinement in another State beyond the jurisdiction of our courts. It is a matter of no consequence who advised the filing of the bill, whether it was done by friends and relatives or other persons. Being insane she could give no consent to the proceedings had in the divorce case, and, hence, everything that was done in her name was invalid. Consent involves an act of reason, and when one is bereft of reason it follows there can be no consent given that comes from reflection. It is said to be a rule of universal application that where a party is unable, in consequence of mental weakness, to protect himself equity will lend its aid that no

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injustice may be done. Whether there was any fraud in fact the law will presume fraud from the unequal position of the parties in this case, and that will vitiate the decree.

Evidence in this record shows, beyond all dispute, that Mrs. Bradford was insane before she was sent to the St. Louis hospital for more humane care than could be given her among her friends, and this fact must have been known to her husband before he entered his appearance in the divorce case in which the decree was entered. It was known to other relatives, and we do not understand how it is possible defendant could have been ignorant of her mental condition.

Counsel suggest the question of insanity made could only be raised by plea in abatement in the original suit. It is apprehended no one could have interposed that plea but defendant himself, and that he failed to do. How could the insane woman that was named as complainant do it? Her mental condition was such she could not know a bill had been exhibited in her name; but if she had known it, how could she plead in abatement to her own bill? There is no evidence she had any knowledge a bill was pending in her name before decree was pronounced, and if the letters offered in evidence were written and comprehended by her it is not probable she would have consented to the divorce, or any other arrangement that would have separated her from her husband and children. She was suffering under a delusion she had committed some great sin that had alienated her husband's affection from her, and with great earnestness she implored his favor, which, in her ravings, she imagined would restore her to health and happiness again. Evidence was offered with a view to show there was some foundation for such insane belief, but we think her mental and physical condition at the time, as shown by the testimony, were such as to disprove all accusation of guilty conduct, no matter what inculpatory circumstances may have surrounded her.

The decree will be affirmed.

Decree affirmed.

SANNER V. SMITH.

(89 Ill. 123.)

Usury — interest after maturity.

A promissory note was executed, payable six months after date, with interest, annually, at fifteen per cent from "due until paid." The first six months' interest was paid in advance, and after maturity many installments of interest, at fifteen per cent, were paid, usually every six months in advance, for several years. *Held*, usurious, and not within the rule allowing a rate of interest exceeding the statutory rate, after maturity, as liquidated damages for non-payment, when inserted with the sole design of securing prompt payment.*

BILL to cancel note for usury. The opinion states the facts. The plaintiff had judgment.

Gillespie & Happy, for appellant.

Irwin & Krome, for appellee.

SCOTT, J. The note, against which relief is sought in this case, bears date September 29, 1858, and was payable on the 1st day of April, 1859, to the order of defendant, with interest payable annually, at the rate of fifteen per cent, from "due until paid." At the time of making the note, six months' interest was paid in advance, and afterwards numerous installments of interest, at the rate of fifteen per cent per annum, were paid, and indorsed on the note, usually six months' interest at that rate in advance. After the death of one of the principals on the note, and the insolvency of the other, complainant, who was surety on the note, made one payment, and subsequently tendered to the payee a sum sufficient to make up the amount of the balance due on the note, with interest at six per cent per annum, treating the previous payments as so much paid on the principal, and demanded the surrender and cancellation of the note, which was refused.

The principal question raised on the argument is, whether a

* Compare *White v. Illis*, *post*. The same court held, in *Armour v. Forcs*, February 14, 1880, that where a note is usurious, the right to enforce interest, provided in the note as liquidated damages after maturity, is also destroyed.

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usurious rate of interest was reserved in the note by the contract of the parties. The case cannot be assimilated to that class of cases, in this court, that hold that the provision in a promissory note for the payment of a rate per cent in excess of legal interest, after maturity, as liquidated damages for non-payment, if inserted with a single purpose to secure prompt payment, does not render the transaction usurious. Such was not the case here. On the face of the note a usurious rate of interest is reserved, and the fact the payee received semi-annual interest in advance, at the usurious rate specified, through a series of years after the maturity of the note, rebuts the idea the rate of interest specified was inserted with a view to secure prompt payment. It has the appearance of a mere device to avoid the statute prohibiting the taking of usury, and such we are constrained to believe, from the evidence, it was.

The note being usurious, complainant was only obligated to pay the principal with six per cent per annum interest, to entitle him to equitable relief, and that, we understand, he tendered before the bill was filed, which would warrant the court in decreeing costs against defendant, as was done.

The decree will be affirmed.

Decree affirmed.

HYPES V. GRIFFIN.

(89 Ill. 184.)

Negotiable instruments — note by trustees signing individually.

Trustees of a church signed as individuals a note simply describing them as such trustees. *Held*, that they were liable, individually, and that parol evidence was inadmissible to vary the liability.*

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

James M. Dill, William C. Kueffner and Henry H. Horner, for appellant.

Marshall W. Weir, for appellee.

* To same effect, *Powers v. Briggs* (79 Ill. 498), 23 Am. Rep. 175, and note, 178.

note chose to contract in their own names, on behalf of a corporation not dealing in negotiable or other securities, nor engaged in any business requiring the payment of moneys as a part of its legitimate business. So far as this record discloses, this was a single transaction and defendants chose to bind themselves personally, although the money may have been obtained for the benefit of the corporation for which they were acting.

Extrinsic evidence is sometimes admissible, in another class of cases, to exonerate the makers from personal liability. It is where the instrument is signed in the official capacity of the parties sought to be charged, as president and secretary of the corporation, and the debt is that of the corporation. Even if this doctrine can be maintained by the weight of authority, it has no application to the case in hand.

The judgment is warranted by the law and the evidence, and must be affirmed, which is done.

Judgment affirmed.

ROSENMUELLER V. LAMPE.

(89 Ill. 212.)

Judgment—former—when a bar—splitting claim.

Church trustees employed the plaintiff as a teacher and sexton for a year at a fixed compensation, and at the request of the priest he performed similar services a second year on his promise of the same compensation. After all the services had been rendered he recovered judgment against the trustees for a balance due on the first year. *Held*, a bar to an action for the second year's services. (See note, p. 75.)

ACTION against church trustees for services. The trustees had engaged the plaintiff as teacher and sexton, at a fixed sum, for a year. At the end of the year the priest requested him to continue at the same compensation, and he did so. After the expiration of the second year he brought suit and recovered judgment for a balance due for the first year. The present suit was for a balance unpaid on the second year. The plaintiff had judgment below.

James M. Dill and Wm. C. Kueffner, for appellants.

Koerner & Turner, for appellee.

Rosenmueller v. Lampe.

SHELDON, J. (Omitting minor points.)

Again, after the cause of action upon which this suit was brought had fully accrued to appellee, he brought suit against appellants, and recovered a judgment for fifty-four dollars and sixty-five cents for services rendered the first year, which was final, and was paid. This, we conceive, bars the present suit. The rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided and made the subject of several suits; and if several suits be brought for different parts of such a claim, a judgment upon the merits in either will be available as a bar in the other suits. *Camp v. Morgan*, 21 Ill. 256; *Lucas v. LeCompte*, 42 id. 303; *Casselberry v. Forquer*, 27 id. 170. The two years' services having been performed, and any claim therefor due, when the first suit was brought, we think it should be viewed in the light of an entire demand, incapable of division, for the purpose of prosecution. And this, even under the more restricted rule laid down in *Secor v. Sturgis*, 16 N. Y. 548, qualifying somewhat the extent, in this respect, of former decisions in that State. The claim for the respective years' services must be considered as growing out of the one contract made in 1874.

The judgment is reversed and the cause remanded.

Judgment reversed.

NOTE BY THE REPORTER. — In *Corey v. Miller*, Rhode Island Supreme Court, March, 1879, it was held that in an action to recover a balance of an account, the account is so far considered a single whole that the plaintiff cannot make its several items the subjects of distinct suits. He may sue for a part of the account, but if he does he cannot afterward sue for the rest. Citing *Guernsey v. Carver*, 8 Wend. 492; *Bendernagle v. Cocks*, 19 id. 207; *Borngeesser v. Harrison*, 12 Wis. 544.

In *Morey v. King*, Vermont Supreme Court, January, 1879, the plaintiff agreed "to construct all the culvert masonry, cattle-passes, paving and excavating foundation pits" on certain sections of railroad, for which defendants agreed to pay at prescribed rates. Defendants discharged plaintiff from performance before it was completed, and plaintiff brought an action for loss of prospective profit on that part of the work that he was not permitted to do, but in alleging the agreement to do the work he omitted to include the paving in the enumeration of the several kinds of work, so that it was not alleged that he agreed to do the paving, nor that defendants agreed that he might do it, but merely that defendants agreed to pay him at a certain rate for what he did. On that declaration plaintiff was adjudged entitled to recover for loss of profit on culvert masonry, etc., but not on paving, and for the latter he thereupon brought another action. *Held*, adjudicated. The general doctrine that a party cannot divide up an entire claim into parts and maintain a separate suit for each part, whether the claim arises from contract or tort, is well established. Freeman on Judgm. §§ 240, 241; Bigelow on Estoppel, 127-133; Herman on Estoppel, § 7; *Adm'r of Whitney v. Clarendon*, 18 Vt. 253; *Secor v. Sturgis*, 16 N. Y. 548. The same contract and the identical breach of that contract for which recovery is sought to be had in this suit, was in issue and recovered on the former suit. Hence that recovery is a bar to a recovery in the present suit.

GAY v. RAINEY.

(89 Ill. 231.)

Contract — place of making — indorsement in another State.

A negotiable note was executed in Illinois, and sent to the payee in Louisiana, who there indorsed it for accommodation and returned it by mail to the maker in Illinois, who negotiated and delivered it in Illinois. *Held*, that the indorsement was an Illinois contract, and regulated by the law of that State. (See note, p. 78.)

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

T. & L. Krafft, for appellant.

Wilderman & Hamill, for appellee.

BREESE, J. This was *assumpsit* in the St. Clair Circuit Court, by Jefferson Rainey, plaintiff, and against Edward J. Gay, defendant. There were two special counts in the declaration and the common counts. The first count charges the defendant as guarantor of the note in question, and in the second count he is charged as indorser only. The note was executed by Flanagan & Co. and Frances A. Flanagan on November 15, 1871, payable two years after date to Edward J. Gay or order, with interest from date at ten per cent, interest payable semi-annually.

There were various pleas to the several counts, and demurrers thereto, with replications and demurrers to them. As the first count on the guaranty was abandoned, it is not necessary to notice any pleadings applicable to that count, nor to discuss the questions arising upon the demurrer to the additional count, as that avers a guaranty also, and was withdrawn from consideration by the abandonment of that claim. The issues made up by the parties were, the general issue — failure of consideration — the solvency of Frances A. Flanagan, one of the makers of the note — neglect and failure of plaintiff to prosecute his suit with effect against the makers of the note — that defendant indorsed the note in the State of Louisiana,

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and by the laws of that State an indorser is entitled to notice of non-payment by the makers.

The issues being so made up, they were submitted to the court for trial without a jury, and the court found for the plaintiff, and refusing a motion for a new trial, rendered judgment for the plaintiff and the defendant appeals.

[Omitting other questions.]

The point remaining to be considered is, that the indorsement of this note having been made in the State of Louisiana, the liability of the indorser must be governed by the law of that State, which requires notice to the indorser of non-payment by the makers of the note, before an indorser can be charged. We have no doubt of the correctness of this general principle, that the law of the place where a contract is made must govern when its enforcement is sought. What is the contract here? Was any contract made in Louisiana, by this writing of indorsement simply? Clearly not. The note was payable to Edward J. Gay or order. What does he say in regard to it? He testifies the note in question was written and signed at Belleville, Illinois, by the makers thereof, and sent to him by mail; after some delay he indorsed it on November 9, 1871, and returned it with a letter, by mail, to E. T. Flanagan, his object in indorsing being to accommodate Flanagan. Flanagan & Co., the makers, negotiated and delivered it to appellee in Belleville, in this State, before due, and he had no knowledge the note had ever been elsewhere than in the hands of appellant and makers. These facts show this to be an Illinois contract, for by the writing of indorsement, while it remained in the indorser's possession, it had no vitality. He could have erased the indorsement at any moment. The note was made in this State, and was returned to this State and negotiated in this State on the faith of the indorsement. This indorsement formed no contract; to make it a contract the note indorsed must be returned, and when delivered and negotiated the same became a binding contract.

The rule is, the place where a contract is made depends not upon the place where it is actually written, signed or dated, but upon the place where it is delivered as consummating the bargain. 1 Dan. Neg. Inst. 660; referring to *Freese v. Brownell*, 35 N. J. 286; S. C., 10 Am. Rep. 239; *Campell v. Nichols*, 33 id. 81.

This note was made in this State, and indorsed by appellant in Louisiana for the accommodation of the makers, and delivered to

them so indorsed, in Belleville, in this State. The indorsement is governed by the laws of the State where delivered and negotiated. The party to whom appellant lent his signature was the agent for putting the instrument into circulation, and his own contract with those to whom it is negotiated must be judged on the principles of agency which refer the contract to the place where the circulation commences. *Id.* 661, referring to *Cook v. Moffett*, 5 How. 295; *Hyde v. Goodnow*, 3 Comst. 266; *Davis v. Coleman*, 7 Ired. 424.

This undoubtedly is the general rule, and there is nothing in this case to take it out of that rule.

We perceive no error in this record calling for a reversal of the judgment, and we must affirm the same.

Judgment affirmed.

NOTE BY THE REPORTER. — To the same effect, *Muliken v. Pratt*, 125 Mass. 374; S. C., 28 Am. Rep. 241; *Stickney v. Jordan*, 58 Me. 106; S. C. 4 Am. Rep. 251.

In *Hart v. Wills*, Iowa Supreme Court, Oct. 9, 1879, a promissory note was dated in Missouri and signed there by one of the makers; no place of payment was specified. It was executed in consequence of previous negotiations had in Iowa between the principal makers and the son of the payee respecting a loan of money by the payee. After it was executed by one maker the son visited the other makers in Iowa, who signed the note and delivered it to the son who paid the money loaned therefor. *Held*, that the note was an Iowa contract and governed by the laws of that State as to usury. "The *lex loci contractus* depends not upon the place where the note or bill is made, drawn or dated, but upon the place where it is delivered from drawer to drawee, from promisor to payee, from indorser to indorsee. It has been frequently stated that a note is nothing until it is delivered, and that indorsement is not merely writing, but transferring from the hand of the one party to that of the other. 2 Parsons on Notes and Bills, 37. The rule that the law of the place where a bill is made, if no place is designated in the bill for payment, determines its constructive obligation and place of payment applies only when the making of a note includes its delivery, but not otherwise. The dating of the note at a place in Missouri did not designate that place as the place of payment. In *Cook v. Moffat*, 5 How. 295, notes drawn and dated at Baltimore, but delivered in New York, in payment of goods purchased there, were held to be payable in, and governed by the laws of New York. In that case GRIER, J., said: 'Although the notes purport to have been made in Baltimore, they were delivered in New York, in payment of goods purchased there, and, of course, payable there and governed by the laws of that place.'"

In *Dickinson v. Edwards*, New York Court of Appeals, September 16, 1879, 30 Alb. L. J. 347, a promissory note made by defendant as accommodation maker in New York and payable in that State, was discounted for the payee in Massachusetts at a rate lawful there but usurious in New York. *Held*, that the contract was governed by the law of New York and the note was invalid for usury. *Jewell v. Wright*, 30 N. Y. 259, approved. *Bowen v. Bradley*, 9 Abb. Pr. (N. S.) 385 disapproved.

Latham v. Sumner.

LATHAM V. SUMNER.

(89 Ill. 232.)

Sale — piano on rent — rescission — recovery of payments.

The plaintiff upon delivery to him of a piano by the defendant, paid some cash and executed notes for the balance of the price, conditioned that the piano should remain the property of the payee until maturity of the last note, and on any default of payment should be returned to him, and on full payment should become the property of the maker. The first note not being paid, it was agreed that the piano and the notes should be respectively surrendered, and this was accordingly done. Afterwards this action was brought by the maker of the notes to recover the cash payment. *Held* (1), that the transaction was a sale and not a lease; (2), there was no rescission, and the cash payment could not be recovered; (3), *it seems* if the defendant were liable to refund, he would be entitled to recoup or set off any damages for the plaintiff's breach or for deterioration of the instrument. (*See note, p. 81.*)

ACTION to recover payments on an agreement to sell a piano
The opinion states the facts. The defendant had judgment.

John F. Latham, for appellant.

James M. Gregg, for appellee.

WALKER, J. Appellee sold to appellant a piano for \$380. Appellant paid a melodeon at fifty-five dollars, and twenty-five dollars, and gave her three promissory notes for \$100 each, one due in six, one in twelve and the other in fifteen months from date, each drawing ten per cent interest after maturity.

The first and second notes in the series had this condition attached to them, respectively:

"It is agreed, between the maker of this note and A. Sumner, that the piano forte No. 4478, for the use of which, to the maturity thereof, this note is given, is and shall remain the property of A. Sumner, and that in default of payment thereof said piano shall be returned to said Sumner, his agent or attorney."

The condition on the margin of the third note reads:

"It is agreed, between the maker of this note and A. Sumner, that the piano forte No. 4478, for the use of which, to the maturity

thereof, this note is given, shall, upon the payment of this and all prior notes, given for the use of said piano, become the property of the maker of this note.

"A. SUMNER."

Ten dollars was paid on the first note in January, 1876, but no other payments were ever made.

There seems to have been an effort to give this sale the form of a lease of the instrument, but the whole contract considered, it must be regarded a sale. The instrument seems to have been in the possession of appellant at the time the notes were given, which was on the 19th of July, 1875, and so remained until some time in March, 1876, when, the first note not being paid, appellee's agent went to appellant to demand the piano, and if not delivered, to replevy it; but it was then agreed that appellee should take the instrument and surrender the notes to appellant, which was done. At the time, no arrangement or agreement was made as to paying back the advanced payments, or in reference to paying for the use of the piano. Subsequently, appellant brought suit, by attachment, before a justice of the peace, to recover back all payments, against appellee. The case was appealed to the Circuit Court, and a trial therein resulted in favor of defendant, from which plaintiff appeals.

It is urged that appellee could not rescind the contract without placing appellant in *statu quo*, and failing to do so, he is liable for all payments made to him on the contract. Appellant, failing to make payment according to the condition in the notes, should have returned the instrument, and appellee only exercised his undoubted legal right in resuming possession. He violated no contract or legal right of appellant when he took the piano, and not only so, but it was with the consent of appellant, nor was there any agreement to refund payments already made. We are therefore at a loss to see that appellee declared a rescission, because he acted under the agreement itself as well as by mutual consent of the parties. Had appellant refused to cancel the agreement and to restore the property, and appellee had taken it, then a question might have arisen as to a rescission and its consequences.

But even conceding that appellant had the right to sue for the recovery of the payments, she could only recover what is just and fair. As appellee did no wrong nor violated any right, he has not forfeited the right to recoup or set off any damages he has sustained by appellant failing to perform her part of the agreement. She, on

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no principle of law or justice, has the right to profit by her wrong in failing to keep her contract. She has had the use of the instrument about eight months, and the uncontradicted testimony shows the use of it to have been worth fifteen dollars per month. Again, the same character of evidence shows that the piano was depreciated in value, by its use during that time, at least fifty dollars. No reason is perceived why appellee should sustain this loss. He has done nothing to require it, and it is unjust that he should.

If it were conceded, then, that appellant has a legal claim to demand the payments made on the contract, appellee has an equal right to claim for the use of the instrument or its depreciation by being used by appellant. These items, from the evidence, exceed the payments, and hence must defeat a recovery.

The damages sustained by appellee grow out of the contract, and may be recouped against the claim of appellant. The proceeding was commenced before a justice of the peace, and defendant has, without formal pleadings, the right to urge any defense he may have, and hence appellee had the right to avail of this defense.

We perceive no error in this record, and the judgment of the court below must be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — In *Lucas v. Campbell*, 88 Ill. 447, Winsell received a sewing machine and executed the following instrument:

"Received from the Remington E. Company, No. 1 Remington E. Sewing Machine Company machine No. 41,407, on hire at \$5 per month, payment to be made monthly in advance. I hereby agree to give the company notice of any change of my residence or place of business, within three days after such change, and to make punctual payment of the said monthly rent, under the penalty, in case of my falling in either of these agreements, of forfeiting all my interest to said machine under this agreement; hereby expressly waiving, in either such case, all legal notices, formalities and proceedings on the part of the said company to make entry and regain possession of the said machine; the said company agreeing, however, that when the sum of \$85 shall have been paid for the use of said machine by said advance and monthly payment, or otherwise, that they will then, in consideration of said \$85 paid, sell and deliver to me said machine, with a good and effectual receipted bill of sale thereof."

The court said:

"Considerable ingenuity has been employed to give this sale the form and effect of a mere lease. When the entire context is considered, it seems to be perfectly apparent that it was a sale of the machine on monthly payments, until the price was realized, and then the title to vest in the purchaser.

"We are aware of no usage in any department of business where the property leased becomes, by agreement, that of the lessee at the end of the term. Such a custom or usage prevails in no department of business outside of the sale of these machines and a few others, so far as our knowledge extends. Such companies are not believed to be so generous as to give their machines even to the most needy and meritorious. This form of instrument seems intended as a substitute for a chattel mortgage, and to create a lien on the machine sold, without the expense or inconvenience of the execution of a chattel mortgage, and like such an instrument, to give power to the company to resume the possession on default in the payment of any

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installment, and to protect the property from sale, lien or incumbrance by the purchaser or his creditors. But this cannot be held to be a chattel mortgage, or a substitute for one, as none of the requirements of the law regulating such instruments have been observed in its execution. The machine, then, was the property of Winsell when it was attached." And the court held that it was liable to attachment.

Nicholson v. Thomas, Pennsylvania Supreme Court, January 12, 1880, was an action of replevin by Thomas against Nicholson. On the trial, it appeared that Mrs. Lentz, whose administrator defendant was, had in her lifetime rented a piano of one Bellak, under an agreement to pay certain sums at intervals until \$350 had been paid, when it was to become hers; that on the death of her daughter, to whom plaintiff was engaged to be married, she sent the piano to the house of plaintiff's parents, with whom she resided; at this time she had paid about \$225 on account of the piano, and at her death about \$320. The defendant, Nicholson, took out letters of administration on her estate, which was insolvent, and finding the leasing agreement among her papers, paid the arrears due, and removed the piano. Plaintiff, claiming the piano as a gift, tendered the administrator the sum paid by him, and upon his refusal to redeliver brought this action. The defendant requested the court to charge: The payment of the last installment by the administrator was for the benefit of the estate, and the plaintiff, if he have any right at all, has an action for a broken or unfulfilled promise of the decedent. *Answer*. "I do not think that the payment by the administrator can affect the question at all, unless Thomas, the plaintiff, acquiesced."

In the general charge the court said: "The only question is, did Mrs. Lentz give the piano to Mr. Thomas? If you believe she did, what did she give? She gave him her title, and his claim is good as against her. The administrator cannot claim title because he paid the last installment unless Thomas acquiesced, and the proof is that he did not so acquiesce. * * * The defendant, as administrator of Mrs. Lentz, could not, by paying the installments which were in arrear, get a title to the piano after her death, to the prejudice of the plaintiff, and having done this, the plaintiff got the benefit of the payment, it being taken to be on his account."

Counsel argued that the decedent had only the personal privilege of using the piano, and not the ownership; she could not, therefore, make a valid gift of it, and that the plaintiff below could not have compelled her to complete the gift.

But the court said: "Whatever title Mrs. Lentz had in the piano, upon which, at the time of her death, she had paid \$320, leaving only thirty dollars unpaid, she had a perfect right to give to the plaintiff below. No question was raised on the trial as to the rights of creditors. Such being the case, her administrator could not, by paying the thirty dollars, destroy the gift, which, as it was accompanied by possession, was irrevocable by her, and, of course, by her personal representative. The charge of the learned court below was entirely right, and the errors assigned are not sustained."

McCarthy v. Lavasche.

McCARTHY v. LAVASCHE.

(89 Ill. 270.)

Corporation — individual liability of stockholders — estoppel — how enforced.

Persons holding themselves out to the world as stockholders of a corporation, and thus inducing persons to credit the corporation and make deposits on the faith of its valid organization and the individual liability of its stockholders, are estopped from alleging the unconstitutionality of the charter as a means of escaping their individual liability.

Where a statute creating a corporation provides that each stockholder shall be liable to double the amount of his stock, his liability is enforceable at law, and each stockholder is severally liable to any creditor. (*See note, p. 88.*)

ACTION to enforce individual liability of a stockholder. The opinion states the facts. The plaintiff had judgment below.

Goudy & Chandler, for appellant.

Shufeldt & Westover, for appellee.

WALKER, J. The National Loan and Trust Company was organized under an act of the General Assembly, approved on the 9th of March, 1867. Under the provisions of an act adopted and approved the 26th of March, 1872, the corporation changed its name to that of the "Bank of Chicago;" and appellee, being a creditor of the bank, brought an action of debt against appellant for its recovery.

The declaration avers that the corporation was, amongst other things, authorized to borrow money, to receive money on deposit, to loan money and make discounts, etc.; that on the 26th of August, 1873, the bank owed, and was and still is indebted to, appellee in the sum of \$100, for money received of appellee on deposit; that appellant then was, and still is, a stockholder, and the owner of one share of \$100 in the bank; that the bank had become, and still is, utterly insolvent, and that appellant had not assigned or transferred his stock in the bank.

The declaration further avers that the charter of the incorporation contains this provision: "And each stockholder shall be liable to double the amount of stock held or owned by him, and for three

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to his injury, shall not be permitted to question the act or the truth of the statement. So, on the same principle, appellant should be estopped, as his acts contributed to the organization of this company, and he held himself out to the world as a stockholder therein, and liable to the extent of double the amount of his subscription. Had the company not been organized, appellee would not have lost his money, and appellant thus contributed to that loss.

In *Ferguson v. Landran*, *supra*, appellants denied the validity of a tax levied under a local law, but the court held they were estopped to deny the validity of the law, because they had approved it and availed of its benefits, and aided in procuring its passage. The court held the law unconstitutional, but enforced the tax. The court say, "parties are estopped from denying the constitutionality of a local statute by participating in the procurement of its passage, by ratifying, acquiescing in, or approving it after its passage, and by becoming recipients of benefits under it; and all such persons are held to be liable to the tax authorized by such enactment, although it is unconstitutional and invalid as to all other persons."

Here, appellant approved of the act, and availed himself of its benefits by subscribing for stock and becoming entitled to exercise all the rights and privileges of a stockholder in the corporation. Justice, morality, public policy and precedent, all demand that appellant should be estopped from denying the constitutionality of the law. If stockholders might show the law unconstitutional, and their organization void, and all their acts unauthorized, then all persons engaged in the organization of the corporation should be held liable for the consequences of their illegal and unauthorized acts, independent of the clause in their charter. So they should, in no event, escape liability for obtaining money without authority.

Suppose these stockholders had formed a partnership, with articles of partnership containing precisely the same provisions that are contained in their charter, and had put in capital stock to the same extent, and the same amounts they each subscribed in shares, would any one question the legality of the organization, or the legal liability of each of the members of the firm? We apprehend these propositions would be conceded. And if so, in principle, what distinction can be taken between the supposed case and the one at bar? Had the shareholders written under the charter a statement that it was unconstitutional and void as a law, but that they adopted it as articles of partnership, and that each would be bound by its terms

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and conditions, and would pay in, for capital stock, the sums set opposite their several names, and they had signed it, and specified the sum to be paid in, could it be doubted that each member would have been liable, under the articles thus executed? And if so, when stripped of mere form, and substance is alone considered, this organization is in effect the same. We can perceive no well-grounded distinction. We are therefore of opinion, that independent of all constitutional questions, each shareholder became liable under the charter as articles of partnership, as it operated as an agreement by each subscriber to be liable to creditors to double the amount each subscribed.

It is urged that, under the language of the third section of the charter, although a liability may be created to double the amount of the stock, still it is to the corporation, and not to the creditors. The obvious purpose of the General Assembly was to secure the creditors of the institution. And if so, why make a provision which the creditor could not, and the directors would not, in all probability, enforce? On their refusal, the creditor, if that construction is to be given, would be compelled to proceed by *mandamus*, had the law been valid, to compel suits to be brought by the corporation against shareholders, and then, in all probability, after years of delay in litigation, to get the money into their hands, a further delay would be liable to ensue until a recovery could be had against the bank, and the money realized at the end of long, obstinate and expensive litigation. Such a course could not, we think, have been intended. Such a requirement would greatly impair, if it did not render the security worthless. We must therefore conclude, that as the provision was intended to secure the creditor, it was intended that his remedy should be direct and effective, and that he might sue in his own name and at law.

If this association only amounted to a partnership, as we have seen it was, then the firm could not sue one of its members to compel the payment. Nor do we perceive how the firm could maintain a bill for the purpose. Hence we must conclude that it was intended that the liability should be direct to the creditor, and not to the firm.

It is next urged that the remedy is in equity, and not at law. Actions at law were maintained in the cases of *Culver v. Third National Bank*, 64 Ill. 528, and *Corwith v. Culver*, 69 id. 502, under a statute creating a liability of the stockholder. It was then urged

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that the remedy was in equity, but we held that it was a legal liability and could be enforced by an action at law. That statute did not determine, in terms, in which forum the remedy should be sought; but it being a legal right, the remedy was held to be at law.

It is urged that the liability should be construed to be joint against all the stockholders. To do so would, we think, do violence to the language of the statute. The language is: "Each stockholder shall be liable to double the amount of stock held or owned by him, for three months after giving notice of transfers, as hereinafter mentioned." This language renders the stockholders severally and individually liable.

The judgment of the court below must be affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — To the same effect as to the doctrine of estoppel, see *Bidwell v. City of Pittsburgh*, 85 Penn. St. 412; S. C. 27 Am. Rep. 662.

As to the enforcement of the stockholders' liability, *Terry v. Little*, United States Supreme Court, October term, 1879, seems to hold differently from the principal case. The following is a statement of that decision: By the charter of a bank, the stockholders were made liable for its debts. They were not made directly liable to the creditors, and were not in terms obliged to pay the debts, but were "liable and held bound for any sum not exceeding twice the amount of their shares." *Held*, that an action must be brought against all the stockholders jointly for contribution, and a single stockholder could not be sued by a single creditor. The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. If the object is to provide a fund out of which all creditors are to be paid share and share alike, one creditor should not be permitted to appropriate to himself, without regard to the rights of others, that which is to make up the fund. The meaning of the statute in question was, that on the failure of the bank, each stockholder shall pay such sum, not exceeding twice the amount of his shares, as shall be his just proportion of any fund that may be required to discharge the outstanding obligations. The provision is, in legal effect, for a proportionate liability by all stockholders. Undoubtedly the object was to furnish additional security to creditors, and to have the payments, when made, applied to the liquidation of debts. So, too, it is clear that the obligation is one that may be enforced by the creditors, but as it is to or for all creditors, it must be enforced by or for all. The form of the action, therefore, should be one adapted to the protection of all. A suit at law by one creditor to recover for himself alone is entirely inconsistent with any idea of distribution. As the liability of the stockholder is not to any individual creditor, but for contribution to a fund, out of which all creditors are to be paid alike, the appropriate remedy is by suit to enforce the contribution, and not by one creditor alone to appropriate to his own use what belongs to others equally with himself. *Pollard v. Bailey*, 20 Wall. 520. Under this charter, the suit to enforce the liability should be in the nature of a suit in equity, by or for all creditors, and that it cannot be at law by one creditor, by one creditor for himself alone, against two stockholders who are not jointly liable on account of the shares standing in their names.

In *Hatch v. Dana*, Supreme Court of the United States, October term, 1879, it was said that the liability of a subscriber for the capital stock of a corporation is several and not joint, and he becomes a several debtor to the company as much so as if he had given his promissory note for the amount of his subscription, and a judgment creditor of an insolvent corporation is at liberty to proceed against one or more of delinquent subscribers to recover the amount of his debt without an account being taken of other indebtedness and without bringing in all the stockholders for contribution. The court said: "That unpaid stock subscriptions are to be regarded as a fund, which the corporation holds for the payment of its debts, is an undeniable

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preposition. But the appellants insist that a creditor of an insolvent corporation is not at liberty to proceed against one or more delinquent subscribers to recover the amount of his debt without an account being taken of other indebtedness, and without bringing in all the stockholders for contribution. They insist, also, that by the terms of the subscriptions for stock made by these appellants they were to pay for the shares set opposite their names, respectively, 'as called for by the said company;' that the company made no calls for more than thirty per cent; that, therefore, this company could not recover the seventy per cent unpaid without making a previous call, and that a court of equity will not enforce the contract differently from what was contemplated in the subscription.

These positions, we think, are not supported by the authorities — certainly not by the more modern ones — nor are they in harmony with sound reason, when considered with reference to the facts of this case. The liability of a subscriber for the capital stock of a company is several and not joint. By his subscription each becomes a several debtor to the company, as much so as if he had given his promissory note for the amount of his subscription. At law, certainly, his subscription may be enforced against him without joinder of other subscribers. And in equity his liability does not cease to be several. A creditor's bill merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation. It does not change the character of the debt attached or garnished. It may be that if the object of the bill is to wind up the affairs of this corporation, all the shareholders, at least so far as they can be ascertained, should be made parties that complete justice may be done by equalizing the burdens and in order to prevent a multiplicity of suits. But this is no such case. The most that can be said is that the presence of all the stockholders might be convenient, not that it is necessary. When the only object of a bill is to obtain payment of a judgment against a corporation out of its credits or intangible property, that is, out of its unpaid stock, there is not the same reason for requiring all the stockholders to be made defendants. In such a case no stockholder can be compelled to pay more than he owes.

In *Ogilvie v. Knox Insurance Company*, 22 How. 380, the question was considered. That was a case in which several judgment creditors of a corporation had brought a creditor's bill against the company and thirty-six subscribers to its capital stock. The bill alleged that the complainants had recovered judgments against the company, upon which executions had been issued and returned 'no property;' that the other defendants had severally subscribed for its stock, and that the subscriptions remained unpaid, payment not having been enforced by the company. The prayer of the bill was that these other defendants might be decreed to pay their subscriptions, and that the judgments might be satisfied out of the sum paid. It was objected as here, that the bill was defective for want of proper parties, but the court held the objection untenable. In delivering the opinion of the court GRIER, J., said: 'The creditors of the corporation are seeking satisfaction out of the assets of the company to which the defendants are debtors. If the debts attached are sufficient to pay their demands the creditors need look no further. They are not bound to settle up all the affairs of the corporation and the equities between its various stockholders, corporators or debtors. If A is bound to pay his debt to the corporation in order to satisfy its creditors, he cannot defend himself by pleading that these complainants might have got their satisfaction out of B as well. It is true, if it be necessary to a complete satisfaction of the complainants that the corporation be treated as an insolvent, the court may appoint a receiver with authority to collect and receive all the debts due to the company and administer all its assets. In that way all the other stockholders or debtors may be made to contribute.' The court, therefore, directed a decree against the respondents severally for such amounts as appeared to be due and unpaid by each of them for their shares of the capital stock.

This case is directly in point, and it does not stand alone. In *Bartlett v. Drew*, 57 N. Y. 587, it was ruled that when the property of a corporation had been divided amongst its stockholders before all its debts had been paid, a judgment creditor, after the return of an execution unsatisfied, might maintain an action, in the nature of a creditor's bill, against a stockholder to reach whatsoever was received by him, and that he was not required to make all the stockholders parties to the action; that he had nothing to do with the equities between the stockholders, unless he chose to intervene to settle them. This is much beyond what the complainant needs in this case. It is enforcing against stockholders in severalty what the corporation could not enforce, without any regard to the equities of one against the others.

So in *Pierce v. Milwaukee Construction Company*, 38 Wis. 253, which was a proceeding analogous

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to a creditor's bill, and brought to enforce payment to a judgment creditor of the company of unpaid subscriptions to its capital stock, it was ruled the complaint was not bad because all the stockholders were not made defendants. This, it is true, was a proceeding under a statute, but it was a statute enacting substantially this equity rule.

In *Marsh v. Burroughs*, 1 Woods, 468, a bill of certain creditors who had recovered judgments against a bank to recover from some stockholders who had not paid in full their subscriptions, non-joinder of parties was set up in defense. Mr. Justice BRADLEY, said: 'A judgment creditor who has exhausted his legal remedy may pursue in a court of equity any equitable interest, trust or demand of his debtor in whosoever hands it may be. And if the party thus reached has a remedy over against other parties for contribution or indemnity, it will be no defense to the primary suit against him that they are not parties. If a creditor were to be stayed until all such parties could be made to contribute their proportionate share of the liability he might never get his money.'

The case of *Wood v. Dummer*, 3 Mason, 808, upon which the appellants largely rely, was not an attempt to reach unpaid stock subscriptions. It was sought to follow the property of a corporation paid over to its shareholders before its debts were paid. But even in that case the bill was sustained, though all the shareholders were not made defendants. Those not sued appear to have been treated only as convenient, not as necessary parties.

The cases of *Pollard v. Bailey*, 20 Wall. 590, and *Terry v. Tubman*, 92 U. S. 156, are not in conflict with *Ogilvie v. Knox Insurance Company*. They arose under statutory provisions imposing upon the stockholders of banks a liability for the debts of the corporation 'in proportion to their stock held therein.' It was this liability beyond the stock subscription which was sought to be enforced, and as it was only a proportional liability its extent could be ascertained only when the obligation of the other shareholders was taken into consideration. Hence, it was ruled that the proper mode of proceeding was by bill in equity in which an account of the debts and stock could be taken and a *pro rata* distribution could be made. Not a hint was given that *Ogilvie v. Knox Insurance Company* was intended to be questioned or qualified. Indeed, the cases of *Pollard v. Bailey* and *Terry v. Tubman* have little analogy to *Ogilvie's case*, or to the one we have now before us. They were both suits at law. The debt due by these appellants to the corporation of which they are members is a fixed and definite one, and it is neither more nor less because other debts may be due to the company from other stockholders.

We hold, therefore, that the complainant was under no obligation to make all the stockholders of the bank defendants in his bill. It was not his duty to marshal the assets of the bank or to adjust the equities between the corporators. In all that he had no interest. The appellants may have had such an interest, and if so it was quite in their power to secure its protection. They might have moved for a receiver, or they might have filed a cross-bill, obtained a discovery of the other stockholders, brought them in and enforced contribution from all who had not paid their stock subscriptions. Their equitable right to contribution is not yet lost."

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(89 Ill. 331.)

Landlord and tenant — boundary on non-navigable stream — accretions.

A lessee of land bounded by the "present bank" of a non-navigable stream, is entitled during his term to the accretions formed by the receding of the stream or a change in its current, in the same manner as a grantee would be entitled.

ACTION of ejectment. The opinion states the facts. The plaintiff had judgment below.

C. W. & E. L. Thomas, for appellant.

Gustavus Koerner, for appellee.

CRAIG, Ch. J. This action was brought to recover a portion of survey 759 of Cahokia Commons, which is situated between Old Cahokia creek and the Mississippi river, in St. Clair county.

On the trial of the cause it was proven by the defendant, that in 1858 the plaintiff subdivided and platted the premises into lots of different sizes, and on the 2d day of July, 1860, the various lots were leased by a written indenture or lease, under seal, to divers individuals for a term of ninety-nine years. The leases were executed by Francis Lavallo, supervisor of Cahokia Commons, under and by virtue of an act of the General Assembly of the State of Illinois, entitled "An act to amend an act entitled 'An act to authorize the supervisor of the village of Cahokia to lease part of the commons appertaining to said village,' approved the 18th of February, A. D. 1857." The defendant did not connect himself with these leases, but they were offered for the purpose of proving that the right of possession was not in the plaintiff—in other words, to establish an outstanding title.

[After holding that the lease is an outstanding title, and thus the action is not maintainable.]

It seems to be the settled law of the country, that the owner of land bordering upon a river not navigable at common law, such as the Mississippi river, will be entitled to claim to the center of the current of the stream. This doctrine was settled in this State in an early day, in the case of *Middleton v. Pritchard*, 3 Scam. 510, and it

has been followed in many cases, and see *Bracon v. Bressler*, 64 Ill. 488, and *Chicago and Pacific Railroad Co. v. Stein*, 75 Ill. 41. There can therefore be no dispute that these lots which had their western boundary upon the Mississippi river, would be liable to losses in case the river should wash away a part of the lots bordering thereon; at the same time the lot owners would be protected in alluvion caused by the river receding or changing its current.

The point is however made, that the lessees were not entitled to claim the accretions, and importance is attached to the fact that in the lease the western boundary of the lots is described as the present bank of the Mississippi river. Suppose the lease had read, the bank of the river instead of "present bank," the meaning would have been the same. No doubt the lessees intended to obtain a river front. If such was the object in obtaining it then, it would now be manifestly unjust to the lessees to hold, for the reason that the river had receded, that the landlord could come in and deprive them of the very object and purpose for which they had leased the land.

We think it but right to hold, where the owner of the fee leases a farm or other property fronting upon a river, and by action of the water accretions are added to the property, that the lessee should be entitled to hold such accretions as a part and parcel of the property leased. The accretions are a part and parcel of the property, and no reason is perceived why they should not pass under a lease as well as a deed.

But the question is not, however, entirely new in this court. In *Lombard v. Kinzie*, 73 Ill. 446, the question arose whether the widow of a riparian owner was entitled to dower in the accretions to land which had accrued after the husband had parted with the land; it was there held, she was entitled to dower in such accretions, and the court said, when earth and gravel are thrown up by the action of the waters on the shore of the riparian owner, he, as an incident of ownership in fee, acquires the fee to the accretion. The wife of the owner in fee in the same manner acquires the inchoate right to dower in such accretions. When formed, such accretions become subject, as an incident to the fee, to the same conditions, rights and burdens as the principal to which it is an incident. Had it been leased, the lessee would have held the accretion precisely as he did the land to which it had accrued. Had the land been mortgaged, or under any other lien, subsequent accretions would have come under the same burdens and liens to which the land was subject before its formation.

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The case cited is broad enough to control the question here involved. Indeed, we perceive no reason why the lessees should not be entitled, under the lease, to hold the accretions, and if they are, of course the plaintiff could not recover.

The judgment will have to be reversed and the cause remanded.

Judgment reversed.

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(89 Ill. 412.)

Contract — for service — what authorizes rescission by employer.

The plaintiff agreed, in writing, to serve the defendant for three years, as superintendent and manager of his manufactory of clothing, and to devote his whole time, attention and skill thereto; and the defendant agreed to pay him therefor \$3,000 a year, in equal monthly payments. The plaintiff, without fault on his part, was arrested and kept in jail for about a fortnight, during the busiest season, and the defendant hired another person in his place. On being released, the plaintiff tendered his services, which the defendant refused. He had been paid in full for the time he actually worked.

Held, that the plaintiff could not maintain an action of damages for breach of the agreement. (*See note, p. 100.*)

ACTION for breach of contract. The opinion states the facts. The plaintiff had judgment below.

Gardner & Schuyler, for appellants.

McCoy & Pratt, for appellee.

SCHOLFIELD, J. This was an action by appellee against appellants, upon a written contract, under seal, whereby the former agreed to render personal services for the latter, during a stipulated term, for a price agreed to be paid by the latter.

By the terms of the contract, appellee agreed to enter the employ of appellants as a superintendent and manager of the manufacturing department of appellants (they being engaged in the manufacturing and selling of boys', youths' and children's clothing), in connection with, and under the direction of, Asher F. Leopold, and whenever

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required by appellants' firm or either member thereof, to assist in the purchase and sale of materials and goods manufactured by the firm, in such manner and at such times as the firm should direct. Appellee also agreed that he would continue in the employ of the firm for a period of three years from the 1st day of December, 1874, at which time his services were to commence; that during said time he would devote himself entirely to the business of the firm, in the manner as agreed upon, giving his whole time, attention and skill thereto, and at all times work for the best interests of appellants.

Appellants, as a compensation therefor, agreed to pay appellee the sum of \$3,000 per annum, in sums of \$250 per month, at the expiration of each month.

Appellee commenced work under the contract on the 1st of December, 1874, and continued to render services thereunder until the 12th of January, 1875, when he was arrested by a United States marshal, under an order of the District Court of the United States for the northern district of this State, and put in jail. He remained in jail until the twenty-fifth of the same month, when he was released on bail. Upon being released, he returned to appellant's establishment to resume work under the contract, but they, having obtained another foreman in his place whilst he was in jail, refused to receive him again into their employ.

Appellee has been paid for all the services he actually rendered, and the present suit is only to recover damages for appellants' alleged breach of contract in not continuing him in their employ.

The judgment below was in favor of appellee for \$500.

The covenants of appellee clearly constitute but one single and entire undertaking — each goes to the whole consideration.

The covenant of appellants to pay \$3,000 per annum, although to be paid in monthly payments, was not for a part, but for the whole of the term. The covenant by appellee that he would devote himself entirely to the business of the firm, giving his whole time, attention and skill thereto, goes to the root of the whole matter; and when the situation of the parties, as disclosed by the evidence, is taken into consideration, it is manifest that the failure by appellee to perform his contract from the twelfth to the twenty-fifth of January, inclusive, would render the performance of the rest of the contract by appellee a thing different, in substance, from that which appellants stipulated for. Appellants were engaged in an extensive business in the manufacturing and selling of boys', youths' and children's

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clothing. The month of January was their busiest season of the year. In that month they manufactured their goods for the spring trade, and in the latter part of it they sent out their traveling men with samples. When appellee was arrested, there were in appellants' employ fourteen cutters and three trimmers. It was his duty, as superintendent and manager, to superintend these, lay out their work, direct its performance, etc., and also to inspect and receive work from the tailors, besides discharging various other duties incident to the position he assumed. It required peculiar skill, knowledge and great promptness and fidelity. To delay the manufacturing in that month would obviously work immediate pecuniary loss, to some extent, and must necessarily materially endanger the future prosperity of the business. Rival manufacturers would be enabled to forestall appellants in the trade of that year, and being once forestalled, they might not, during the term, recover their former trade; besides, the character and quality of work have much to do in building up and establishing a prosperous, permanent trade in manufactured articles, and great risk, in that respect, would be incurred by the mere change of superintendents and managers. Nor is it to be assumed that a person of competent experience, skill, energy and fidelity could be got, without a moment's warning, to fill such a position, and induced to stay, from day to day during such a season in the business, for a compensation approaching, in any reasonable degree, a *pro rata* part of that which he would be willing to accept for his services for a term of three years.

In our opinion, therefore, the failure of appellee to perform the services he had covenanted to perform, from the 12th to the 25th of January, 1875, was a substantial breach of his covenant.

Appellee has averred in his declaration, ability, readiness, and offer to perform, and his undertaking being an entire one, it was incumbent on him to make the averment and support it by proof. *Badgley v. Heald*, 4 Gilm. 64; *Swanzy v. Moore*, 22 Ill. 63.

Inasmuch, however, as appellants covenanted to pay for the services monthly, there could, doubtless, have been a recovery on the contract for the services rendered for the month of December, 1874, after the expiration of that month, without any allegation further than that of performance of the contract by appellee during that time; but since that has been paid, and appellee seeks a recovery only for a breach of contract arising from his not being allowed to perform his part of the contract during the subsequent months, he is

bound to aver and show readiness, ability and offer to perform the contract as to the subsequent time. This is held to be the rule in *Cunningham v. Morrell*, 10 Johns. 203, where KENT, Ch. J., carefully examines the authorities, and the court overrules its previous decisions in *Sears v. Fowler*, and *Havens v. Bush*, 2 Johns. 272, 387. This is approved in *Tompkins v. Elliott*, 5 Wend. 496; *Bean v. Atwater*, 4 Conn. 3, and *McClure v. Rush*, 9 Dana, 64.

It may be conceded that appellee was put in jail without his fault, yet this would not relieve him of his covenant to give his whole time, attention and skill to appellants' business. It is not claimed to have been through appellants' fault that he was put in jail, and there is no reason, therefore, why appellants' business should suffer in consequence of it. He might have guarded against this by an exception in his covenant, but he did not do so.

The rule is, it is a good defense to an action on a covenant or contract, that the obligation to perform the act required was dependent upon some other thing which the other party was to do and has failed to do. And the defense is good, although the omission of the other party to do the thing required of him, was produced by causes which he could neither foresee nor control. 2 Pars. on Cont. (6th ed.) 674; Chitty on Cont. (11 Am. ed.) 1086.

There is a class of cases, where a party contracting to render personal services, after part performance, becomes disabled by inevitable casualty and is thereby prevented from fully completing his contract, has been held entitled to recover for the services actually rendered, upon a *quantum meruit*. *Fenton v. Clark*, 11 Vt. 557; *Hubbard v. Belden*, 27 id. 645; *Dickey v. Linscott*, 20 Me. 453; *Wolf v. Howes*, 20 N. Y. (6 Smith) 197. But these furnish no warrant for the position that the laborer can, in such case, recover upon the contract for a failure to pay future services which he has been prevented from performing. On the contrary, they proceed upon the theory that the contract is discharged by the inevitable casualty, and therefore allow the party to recover simply for what he has earned.

Another class of cases may be found, where a party attempting to rescind a contract on account of the default of the opposite party, is held precluded by his acceptance of the property, labor, etc., of the opposite party. But such cases can have no application here. In those cases it is required that it shall be in the power of the party to abandon the materials or product of labor received and rescind the

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contract *in toto*, without an abandonment of his own property, and his failure to thus abandon them is construed as an acceptance of performance. See *Eldridge v. Rowe*, 2 Gilm. 91.

Appellee's counsel cite *Cuckson v. Stones*, 1 Ell. & Ell. 238; S. C., 102 Eng. Com. Law, 248, and *Selby v. Hutchinson*, 4 Gilm. 332, in support of the position he assumes, that appellants' remedy for appellee's failure to keep and perform his covenants was by an action for damages, and that he had no right to treat the contract as abandoned by appellee. The first case, in our opinion, is totally inapplicable to the facts here. There the plaintiff, by an agreement in writing, agreed to serve the defendant as brewer for the term of ten years for a stipulated compensation. He entered upon the performance of the contract, and some years afterwards fell ill, and was unable to attend to business from Christmas, 1857, until July, 1858. He returned to defendant's service, when restored, and the defendant employed and paid him as before. Defendant's counsel conceded, at the trial, that the contract was not abandoned, and the controversy was whether plaintiff should receive full wages during the time he was sick. What was said has reference only to that state of case. Here, appellee never was received into appellants' service after he was in jail. He has done nothing for appellants since that time, and appellants have refused to receive him again into their employ because, they allege, his default justified them in treating the contract as abandoned.

In the other case, *assumpsit* was brought by Hutchinson as administrator of one Teed, for services rendered by Teed in his lifetime, in building a mill for Selby. The work was done under a special contract, and Teed died before the contract was fully performed on his part. His administrator offered to complete the contract, but Selby refused to allow this unless he would take out certain defective work and put other in its place. This the administrator refused to do. It was attempted to show, upon the trial, that Selby had not complied with his contract in not procuring certain material and having certain work done as promptly as it was needed, and as required by the terms of the contract. On the other side, there was evidence showing that Selby's delay was through Teed's default in performing his part of the contract, and that the work to be done and materials furnished by Selby were done and furnished by the time Teed needed them. Teed never undertook to declare the contract abandoned, but on the contrary, proceeded with his work as if he regarded the

contract as still subsisting. It was held that, even if there had been cause of forfeiture, Teed waived it, and that he, and not Selby, was in default.

It will thus be seen the case varies materially, in the questions presented for consideration, from the present.

The general remark made by the court, in discussing the evidence, which counsel quote, that "in order to justify an abandonment of the contract, and the proper remedy growing out of it, the failure of the opposite party must be a total one; the object of the contract must have been defeated or rendered unattainable by his misconduct or default," is not understood as laying down the rule that to justify an abandonment of a contract the opposite party must have failed to discharge every obligation imposed on him — but simply that matters which do not go to the substance of the contract, and the failure to perform which would not render the performance of the rest a thing different in substance from what was contracted for, do not authorize an abandonment of the contract; for when the failure to perform the contract is in respect to matters which would render the performance of the rest a thing different in substance from what was contracted for, so far as we are advised, the authorities all agree the party not in default may abandon the contract.

It is said in Wood's Law of Master and Servant, p. 233, sec. 120: "Sickness for a lengthened period — in one case two weeks — releases both parties from the contract. The master is not bound to wait, unreasonably, for the restoration of his servant's health, and his *necessities* may well be regarded as the measure of what is reasonable." See also *Hubbard v. Belden*, *supra*.

In *Poussard v. Spiers and Pond*, L. R. 1 Q. B. Div. 410, this rule is, in substance, recognized and applied by the court.

Where neither party is at fault, the absence of the servant from the master's employ, without his consent (by whatever cause occasioned), for an unreasonable length of time, we are of opinion, authorizes the master to treat the contract as abandoned; and what, in such case, is an unreasonable length of time, depends upon the nature and necessities of the business in which the servant is employed. Under the facts here proved, a much shorter time than that during which appellee was confined in jail, might, in our opinion, be regarded as unreasonable. Under different circumstances, absence for a much greater length of time might furnish no cause for abandonment — the question always being, does the delay so affect the

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interests of the master that the performance of the residue of the contract by the servant would be a thing different in substance from what the master contracted for?

There was evidence that after appellee was in jail, and whilst he was there, appellants agreed that if he got out and returned to his duties within a certain time, they would receive him into their employ. What that time was is controverted. Appellants claim that it was until the following Monday — appellee that it was two or three weeks. He was not out by the following Monday, but was out within two weeks — being released on the thirteenth day after his incarceration in jail.

Although we think appellants' version, sustained as it is by appellee's admission that the season in appellants' business was such that they could not do without him, at the most, for a greater length of time than two days, is more likely the correct one, we do not deem it of vital moment which is the truth.

This promise did not amount to a contract. There was no mutuality in it, and no consideration to support it. It was a mere offer, which might be withdrawn at any time before it was acted upon. It did not amount to an estoppel, because appellee did no act placing himself in a worse condition than he would otherwise have been in, on the faith of the promise. Had appellee been received again into appellants' employ, the promise, and the act of receiving him, would have been sufficient evidence of a waiver of a right to declare a forfeiture for the previous default. But not being received and doing nothing on the faith of the promise to make his condition different or worse than it would have been had the promise not been made, it might be withdrawn at any time. It was a mere indication of a willingness to extend an indulgence on the part of appellee, which, like any other offered favor, might be withdrawn at pleasure when no substantial right had become vested on the faith of it. See Bigelow on Estoppel (1st ed.) p. 560, § 4.

When appellants refused to receive appellee into their employ upon his return to their place of business, he was fully and sufficiently notified of their election to treat the contract as abandoned, and he needed no other or different notice.

Inasmuch as the rulings and judgment of the court below are not in harmony with the views here expressed, the judgment is reversed and the cause remanded.

Judgment reversed.

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NOTE BY THE REPORTER. — The old doctrine was, that where a contract for personal services was entire, and the performance of one part was the condition of the performance of the other, the party seeking to recover for a breach, must have performed on his part, inevitable accident to the contrary notwithstanding, before he could sustain an action. *Cutler v. Powell*, 6 T. R. 320; the case of a seaman dying before the completion of the voyage, he having taken a note for his entire wages, conditioned on his performance of services during the whole voyage. *Appleby v. Dods*, 8 East, 300; where a seaman was not entitled to wages until the completion of his voyage, and the ship was lost. *Hulle v. Heightman*, 2 Id. 145; where a seaman, shipping under a like agreement, was wrongfully dismissed by the captain. The like doctrine was applied in cases of affreightment. *Atkinson v. Ritchie*, 10 East, 530; *Smith v. Wilson*, 6 East, 487; *Gibbon v. Mendes*, 2 B. & Ald. 17.

In *Harmony v. Bingham*, 12 N. Y. 99, where a carrier agreed to deliver goods in a certain time, but was prevented by a freshet, the court say: "It is a well-settled rule, that where the law creates a duty or charge, and the party is disabled from performing it without any default in himself, and has no remedy over, then the law will excuse him; but where the party, by his own contract, creates a duty or charge upon himself he is bound to make it good, notwithstanding any accident or delay by inevitable necessity, because he might have provided against it by contract."

But even in old times there seems to have been a recognized exception in some cases of contract for personal services. Thus, in *Cutler v. Powell supra*, LAWRENCE, J. remarked: "With regard to the common case of a hired servant, to which this has been compared; such a servant, though hired in a general way, is considered to be hired with reference to the general understanding upon the subject, that the servant shall be entitled to his wages for the whole time he serves, though he do not continue in the service during the whole year. So if the plaintiff in this case could have proved any usage," etc.

But now it seems well settled that where a party, contracting to render personal services is disabled from full performance by inevitable casualty, he may still recover for the services rendered, *quantum meruit*.

In *Fenton v. Clark*, 11 Vt. 557, the contract was for four months' labor, at ten dollars a month, not payable until the end of the term. After one month and twenty days the plaintiff was disabled by sickness, and worked no more. He was entitled to wages *pro tanto*, REDFIELD J. dissenting. The court said: "It is undoubtedly settled law, that where a party by his own conduct creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because, it is said, he might have provided against it by his contract. Upon this principle, when the party covenants to repair, and leave the houses and buildings in as good plight as he found them, he will be answerable for all damage, even if committed by the public enemy, or occasioned by storms, flood, fire or lightning. It is to be remembered that in such cases there is nothing in the nature of things that renders it impossible for the party to perform the obligations which he has assumed by his own contract. In cases where the act of God renders the performance *absolutely impossible*, the contract is discharged, according to the maxim *impotentia excusat legem*." Citing the ancient cases of trees blown down, and of the death of a horse which one had agreed to deliver. "These services being of a personal character, the contract could not be performed by another, and as the plaintiff was disabled to perform them himself, by reason of sickness, which is the act of God, upon the authority of the foregoing cases the contract was discharged. The inquiry then arises, what is the result? It appears to me apparent that the plaintiff must, at least after the expiration of the four months, be permitted to recover as upon a *quantum meruit pro rata* for the services rendered. Common justice requires this, and I should be sorry to find that it was not tolerated by the principles of the common law." Distinguishing *Cutler v. Powell*, 6 T. R. 320. The same doctrine was applied in *Hubbard v. Belden*, 27 Vt. 643, where, however, it was not provided that the wages were not payable till the end of the term.

In *McClure v. Pyatt*, 4 McCord, 26, the contract was for a gross sum for a year, but the parties having separated, it was held that there might be a recovery *pro tanto*. And in *Baer v. Parnell*, 2 Baill. 424, and *George v. Elliot*, 2 Hen. & Munf. 5, the same doctrine was applied in case of death.

In *Blakely v. Linscott*, 20 Me. 153, it was held that an action of damages for an entire breach of

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a parcel contract to labor would not lie, where it appeared that the defendant was wholly prevented by sickness.

In *Wolf v. House*, 30 N. Y. 197, where the contract provided for partial payment during the employment and the remainder at the end of the term, a recovery *quantum meruit* was sustained for part performance, full performance being prevented by sickness; and in *Jones v. Judd*, 4 Comst. 411, the like recovery was sustained in a similar case, on a public contract, the full performance being prevented by act of the legislature.

The same court remarked, in *Spalding v. Rosa*, 71 N. Y. 40; *S. C.*, 27 Am. Rep. 7; where the defendant had agreed to furnish a certain opera troupe to the plaintiff, and the head of the troupe was disabled by sickness: "The sickness and inability of Wachtel occurring without the fault of the defendants constitutes a valid excuse for the non-performance of the contract. Contracts of this character, for the personal services, whether of the contracting party or of a third person, requiring skill, and which can only be performed by the particular individual named, are not, in their nature, of absolute obligation under all circumstances. Both parties must be supposed to contemplate the continuance of the ability of the person whose skilled services are the subject of the contract, as one of the conditions of the contract. Contracts for personal services are subject to this implied condition, that the person shall be able at the time appointed to perform them; and if he dies, or without fault on the part of the covenantor becomes disabled, the obligation to perform becomes extinguished."

This doctrine has also been extended to cases of a contract to sell or deliver specific property, which has subsequently been destroyed by fire. *Dexter v. Norton*, 47 N. Y. 62; *S. C.*, 7 Am. Rep. 415.

In *Ryan v. Denton*, 25 Conn. 188, an apportionment was allowed where the performance was prevented by sickness, the court remarking that the old rule was relaxed, but recognizing the distinction made in *Harmony v. Bingham*, *supra*, approving *Fenton v. Clark*, *supra*.

But we do not find that any court has gone so far as to hold that the master or employer would be liable to an action to receive back the employee, where he had, without his own fault, become partially disabled, and had partially failed to perform his contract of service.

In *Dickey v. Linscot*, *supra*, the court remarked, *obiter*: "The plaintiff was not obliged to accept such a partial performance. He had a right to secure the services of another man. And so, in *Hubbard v. Belden*, the court, *obiter*, remarked: "We think it should be regarded as pretty clear that the defendant would be released from any obligation to wait two weeks for his hired man to recover, upon the uncertainty of his then recovering, before he employed other help. And if so, equally should the plaintiff be at liberty to leave for the time, and he would not be bound to return unless the defendant was bound to receive him, which he was not, under the circumstances of this case."

We do not find that the exact question decided by the principal case has ever been decided in this country, although it was approached in *Spalding v. Rosa*, *supra*, where the action was in effect against the employee for breach of contract.

In *Poussard v. Spiers*, L. R. 1 Q. B. Div. 410; *S. C.*, 17 Eng. Rep. (Moak), 98, however, the question directly arose. The action was by a husband for the wrongful dismissal of his wife, whom he contracted to sing in a particular opera for the defendant, but who had been disabled by illness from attending rehearsals on the first performances. The defendant employed another in her place, and the plaintiff's wife afterwards recovering, tendered her services, which were refused. It was held that the action would not lie. The court said: "This inability having been occasioned by sickness was not any breach of contract by the plaintiff, and no action can lie against him for the failure thus occasioned. But the damage to the defendants and the consequent failure of consideration is just as great as if it had been occasioned by the plaintiff's fault instead of by his wife's misfortune." The test, the court said, "is whether the failure goes to the root of the matter."

It is well settled that if the employee voluntarily and without excuse leaves the service, but returns and offers to renew, the master is not bound to receive him nor to pay him *pro tanto*. *Lantry v. Parks*, 8 Cow. 68; *Spain v. Arnott*, 3 Stark, 227; *Faxon v. Mansfield*, 2 Mass. 147.

In England the same rule as to compensation *pro tanto* is applied where the master dismisses the servant for good cause. *Lilley v. Blwin*, 11 Q. B. 742. But in several of our States it has been held that the servant may recover *pro tanto* even when rightfully dismissed. *Jones v*

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Jones, 2 Swan, 605; *Eakin v. Harrison*, 4 McCord, 249; *Robinson v. Sanders*, 24 Miss. 301; *Lawrence v. Gullifer*, 88 Me. 532.

The modern doctrine, however, seems to be that the servant may recover *pro tanto*, even when he voluntarily abandons his employment, or is rightfully dismissed, subject to an offset for the damage that the employer may have sustained by his failure to perform. The latest case on this point, we believe, is *Duncan v. Baker*, 21 Kans. 99. There D. hired B. to work for him seven months at fifteen dollars per month, and B. worked only fifty-nine days, and then quit without any excuse. It was held that he might recover *quantum meruit*, less the damage sustained by D. The court reviews the authorities as follows:

"Mr. Parsons, in his work on Contracts, speaking of entire contracts, says:

" 'So, too, if one party, without the fault of the other, fails to perform his side of the contract in such a manner as to enable him to sue upon it, still, if the other party have derived a benefit from the part performed, it would be unjust to allow him to retain that without paying anything. The law, therefore, generally implies a promise on his part to pay such a remuneration as the benefit conferred upon him is reasonably worth; and to recover that *quantum* of remuneration, an action of *indebitatus assumpsit* is maintainable.' 2 Pars. Cont. 6th ed. 521.

"Many authorities may be found to sustain the foregoing proposition of Mr. Parsons, and to sustain it in all its various aspects. Thus, authorities may be found to sustain it with reference to contracts of sale; contracts to do some specific labor upon real estate, as building or repairing houses, etc.; contracts to do some particular labor upon personal property, as making or repairing specific articles of personal property, and contracts for personal services. The leading case which sustains the foregoing proposition with reference to contracts for personal services, is the case of *Britton v. Turner*, 6 N. H. 481. That was an action of *indebitatus assumpsit*, with a *quantum meruit* count for work and labor performed. The plaintiff had contracted to work for the defendant for one year for the sum of \$100; but he left the defendant's employment after working for him for only about nine months, without the consent of the defendant and without good cause. It was held, however, that he might recover on the *quantum meruit* count, notwithstanding his failure and refusal to work the full time that he had agreed to. There are other cases directly applicable to the present case, to some of which we shall hereafter refer.

"Mr. Field, in his work on Damages, says that: 'The doctrine now generally recognized in case of part performance of a contract for personal services is, that if the employer accepts the benefit of what has been done, whether voluntarily or from the necessity of the case, the employee may recover according to the contract price, for what has been done; or where he is to receive a fixed sum for the whole work, then in the proportion which the work done bears to the whole work; or where there is no price fixed, then upon a *quantum meruit*, from which however there must be deducted whatever damages may have resulted to the employer from the failure to fully perform the contract by the employee.' Field on Damages, § 327.

"Mr. Field, also, after commenting upon the case of *Britton v. Turner*, *ante*, and speaking of the argument therein contained as being an able one, then says, that 'the tendency of the decisions seems to be in harmony with the views thus ably set forth.' § 332. He further says: 'The doctrine of *Britton v. Turner* is also now fully or partially recognized in Michigan, Wisconsin, Indiana, Illinois, Pennsylvania, Maine, Texas, Tennessee, Missouri, New York and other States.' § 334. 'And the doctrine, in view of its manifest justice, is likely to grow in favor until it becomes universally recognized.' § 335.

"Mr. Parsons also says: 'The case of *Britton v. Turner*, 6 N. H. 481, resists the whole doctrine of these cases [previously by him cited], and permits the servant to recover on a *quantum meruit*. His right to recover is carefully guarded in this case by principles which seem to protect the master from all wrong; and to require of him only such payment as is justly due for benefits received and retained, and after all deduction for any damage he may have sustained from the breach of the contract. So guarded, it might seem that the principles of this case are better adapted to do adequate justice to both parties, and wrong to neither, than those of the numerous cases which rest upon the somewhat technical rule of the entirety of the contract.' 2 Parsons on Cont. 6th ed. * 88, 89.

"The following cases are also in point: *Pisler v. Nichols*, 8 Iowa, 106; *McClay v. Hedges*, 18 Id. 86; *McAfferly v. Hale*, 24 Id. 356; *Byerlee v. Mendel*, 39 Id. 382; *Wolf v. Gerr*, 43 Id. 330.

"In the case of *McClay v. Hedges*, *ante*, Judge DILLON, who delivered the opinion of the

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court, uses the following language: 'This question was settled in this State by the case of *Field v. Nichols*, 8 Iowa, 106, which distinctly recognized and expressly followed the case of *Britton v. Turner*, 6 N. H. 481. That celebrated case has been criticised, doubted, and denied to be sound. It is frequently said to be good equity but bad law; yet its principles are gradually winning their way into professional and judicial favor. It is bottomed on justice, and is right upon principle, however it may be upon the technical and more illiberal rules of the common law as found in the older cases. 18 Iowa, 68.'

"See, also, *Hillyard v. Crabtree*, 11 Tex. 264; *Carroll v. Welch*, 26 Id. 149; *Hollis v. Chapman*, 26 Id. 1, 5. In the last case cited, the court uses the following language: 'But this court, by a succession of decisions, has settled the question of the apportionability of contracts, and we are inclined to follow those decisions in this case.' [Citing the above and other cases.] In the last case the court says: 'The doctrine of the earlier decisions, to the effect that where the contract, in cases like the present, is entire, the performance by the employee is a condition precedent, and he has no remedy until he has fully performed his part, is not now the recognized doctrine of the courts.'

"See, also, *Lamb v. Brodski*, 38 Mo. 51, 53; *Ryan v. Dayton*, 25 Conn. 188; *Epperly v. Bailey*, 3 Ind. 73. See, also, the numerous cases cited by Mr. Field in his work on Damages, § 334, note 24; also, cases cited in 3 U. S. Dig., 1st series, p. 521, No. 2390.

"The weight of authority at the present time, we think, is unquestionably against the doctrine that where a contract is entire, and consequently not apportionable, and has been only partially performed, the failing party is not entitled to recover or receive anything for what he has actually done. It will perhaps be admitted that the doctrine has been overturned with respect to all contracts except those for personal services; and if so, then there is not much of the doctrine left. But if the doctrine is to be abandoned with reference to all contracts except those for personal services, then why not abandon the doctrine altogether? The reason usually given is, that the employer, in contracts for personal services, has no choice except to accept, receive and retain the services already performed, while in other contracts he may refuse to accept, or may return the proceeds of the partially performed contract if he choose. But this is not always, nor even generally, true with respect to other contracts. Suppose a miller purchases a thousand bushels of wheat for a thousand dollars, the wheat to be delivered within one month; he receives the wheat as it is delivered, and grinds it into flour; when the vendor has delivered 500 bushels he refuses to deliver any more; what choice has the miller, except to retain what he has already received? This kind of supposition will also apply to the purchase and sale of all other kinds of articles, where the purchaser on receiving them changes their character so that he cannot return them. Or suppose that an owner of real estate employs a man to build or repair some structure thereon for a gross but definite sum, the owner of the real estate to furnish the materials or a portion thereof in case of building, and either to furnish them in case of repairing, and the job is only half finished; what choice has the owner of the real estate with reference to retaining or returning the proceeds of the workman's labor? This kind of supposition will also apply to all kinds of work done on real estate, and will often apply to work done on personal property. Of course, in all cases where the employer can refuse to accept the work, and does refuse to accept it, or returns it, he is not bound to pay for it unless it exactly corresponds with the contract; but where he receives it and retains it, whether he retain it from choice or from necessity, he is bound to pay for the same what it is reasonably worth, less any damage that he may sustain by reason of the partial non-fulfillment of the contract. Of course, he is not bound to pay anything unless the work is worth something, unless he receives or may receive some actual benefit therefrom; and where he receives or may receive some actual benefit therefrom, he is bound to pay for such benefit (and only for such benefit), within the limitations hereinbefore mentioned."

It seems, however, that if the employee is temporarily disabled by sickness, and abandons the employment, and on recovery is received again by his master, he cannot recover for the time of his disability and absence, although the contract is entire. *Barnes v. Chicago Ball Club* (Illinois Common Pleas), 11 Chicago Legal News, 87.

LEUCKER V. STEILEU.

(89 Ill. 545.)

Seduction — evidence to sustain action for.

In an action by a father for the seduction of his minor daughter, proof of the sexual intercourse followed by pregnancy, confinement and child birth, all while the daughter was living with the father, is sufficient.

ACTION of seduction. The opinion states the facts. The plaintiff had judgment below.

S. Ashton, for appellant, contended that the proof showed no seduction, and that the plaintiff, before he would be entitled to recover, must show, in addition to illicit intercourse, that the daughter's consent was obtained by flattery, promises or other artifices used by the defendant.

T. A. Moran, for appellee.

SELDON, J. This was an action for the seduction of plaintiff's daughter, which resulted in a verdict and judgment for plaintiff for \$500 damages. The defendant appealed.

The evidence shows that at the time of the act complained of the daughter was living with her father and was about fifteen years of age, and that the defendant was her uncle by marriage, he being the husband of her mother's sister or half-sister; that the girl became pregnant and was delivered of a child, the result, as the girl testified, of an act of sexual intercourse with the defendant. The defendant denied having such intercourse. The testimony of the daughter was corroborated by that of her father, the plaintiff, of admissions made by the defendant.

The point is made that there was no seduction in the case. If the sexual intercourse, with the result testified to, took place there was enough of seduction to sustain the suit. All that the declaration alleges or need allege in this respect is that the defendant assaulted and debauched and carnally knew the daughter. In the case of *Kennedy v. Shea*, 110 Mass. 147; *S. C.*, 14 Am. Rep. 584, an action

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for seduction, it was said, respecting this point: "As the gist of the action is the debauching of the daughter and the consequent supposed or actual loss of her services, it is immaterial to the plaintiff's claim under what particular circumstances the injury was wrought, or whether it was accompanied with force and violence or not. The action will lie although trespass *vi et armis* might have been sustained. It would be no defense that the crime was rape and not seduction."

In *White v. Murtland*, 71 Ill. 268; S. C., 22 Am. Rep. 100, a similar action, this court said: "Upon the principle that plaintiff's daughter was incapable of consenting, the fact that she yielded without force or seduction would not constitute a bar to the action. Still it seems to be settled, and properly so, that if a seduction be not proved damages for seduction should not be given."

Finding no sufficient reason for the reversal of the judgment it is affirmed.

Judgment affirmed.

OLNEY v. HOWE.

(89 Ill. 552.)

Contract — by married woman to support another — gift.

A married woman agreed in writing to support her mother for life, and the mother, in consideration thereof, assigned to her all her personal effects and agreed to give her at her death a note of \$1,300 against a third person, the mother reserving the interest thereof for her life, but no present assignment of the note was made. *Held* (1), that there was no gift of the note, nor any trust therein in the mother for the daughter's use; (2), that the agreement was invalid because it did not relate to the wife's separate property or earnings, nor to her separate trade or business.

ACTION respecting the ownership of a promissory note for \$1,300 by Laura L. Olney, as administratrix of Sophia L. Bogart. The plaintiff, Laura L. Olney, claimed the note by virtue of the following instrument:

"This indenture, made this 7th day of April, 1873, between Sophia Bogart, of Pontiac, Illinois, of the first part, and Laura L. Olney, of the same place, of the second part, witnesseth, that the party of the second part, for and in consideration of the covenants and agree-

ments, sale and assignments hereinafter made by the party of the first part, does hereby covenant and agree to and with the said party of the first part that she will furnish her a home in her family and a good and comfortable support during the term of her natural life. The party of the first part, for and in consideration of the covenants and agreements hereinbefore made by the party of the second part, does hereby sell, assign and transfer to said party of the second part all her property and effects, consisting of household goods and \$1,300, and the notes or other securities held therefor, possession of the same to be given to and taken by the party of the second part immediately upon the decease of the party of the first part. It is further mutually agreed by and between the parties that the party of the first part is to have the full use of the interest of said \$1,300 during her lifetime, and that the party of the second part shall, at and after the decease of the party of the first part, pay to Alfred S. Howe, a son of the last-named party, \$300, and that the covenants, agreements and assignments herein contained shall be binding upon the heirs, executors, administrators and assigns of the respective parties.

“In witness whereof the parties have hereunto set their hands and seals the day and year first above written.

“SOPHIA G. BOGART. [Seal.]

“LAURA L. OLNEY.” [Seal.]

The other facts appear in the opinion.

A. E. Harding, for appellant.

S. S. Lawrence, for appellee.

BAKER, J. The instrument on which appellant's claim is based did not take effect as a completed gift *inter vivos*, or as an executed contract, to work the transfer of title to appellant. There was no assignment or delivery of the note for \$1,300. The instrument was clearly executory in its character. By its terms possession of the property was to be given to and taken by appellant upon the decease of Mrs. Bogart, who was to have the full use of the interest on the \$1,300 during her lifetime, and after her death appellant was to pay Alfred S. Howe \$300 of the money secured by the note. There is in the instrument no declaration of trust, and it does not appear there

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from that it was the intention of Mrs. Bogart to assume the position of trustee and thereafter hold the note and other property in trust for the benefit of appellant as *cestui que trust*. The writing is essentially testamentary in its nature, and omitting for the present the element of contract its object was to make disposition of property after the death of the owner. It did not, after such death, take effect as a testamentary devise for it was not executed and witnessed as required by the statute of wills.

The question then arises, was the instrument, at the time it was made, a valid and binding executory contract between the parties?

To make it a valid executory contract both parties must have been bound thereby. The promises of each party must have been concurrent and obligatory on both at the same time to render the promise of either binding. 1 Chit. 297; *Tucker v. Woods*, 12 Johns. 190. This court said, in *McKinley v. Watkins*, 13 Ill. 142, "unless the plaintiff were bound on his part not to do the act which formed the consideration of the promise of the defendant, the agreement was void for want of mutuality," and said, in *Nelson v. Hayner*, 66 Ill. 490, "it is indispensable to every legal contract that there be two contracting parties competent to contract." It is admitted that at the date of the execution of the instrument, Laura L. Olney was a married woman living with her husband. Being such, did said instrument become obligatory on her, and was she bound, as provided therein, to furnish Mrs. Bogart a home in her family and a good and comfortable support during the term of her natural life?

At common law a married woman had no power to bind herself by contract. She might, it is true, have made a charge upon her separate estate in equity, but that was regarded not as an obligatory personal contract but as an appointment out of such estate. The appellant had, then, no legal capacity to bind herself to do that which she agreed to do by this instrument, unless such capacity was conferred either by the married woman's act of 1861 or by the statute of 1869. The latter act conferred upon her the right to receive, use and possess her own earnings and sue for the same in her own name. In *Haight v. McVeagh*, 69 Ill. 625, a contract by a married woman (who was earning money by keeping a retail grocery store) to pay for goods to be used in her enterprise was held valid, and an action at law against her for the breach thereof was sustained, and this upon the ground that such a contract was within the statute of 1869 giving her the right to sue in her

own name for her earnings. It was stated in that case that the earnings were not to be limited to such, only, as should result from manual labor, and the court said, "the goods were purchased by the appellant to be used in her business as proprietress of a retail grocery store." In *Thompson v. Weller*, 85 Ill. 197, this court, in referring to the decision in the former case, said: "The court expressly put it upon the ground that the right to earnings, mentioned in the statute, is not limited to those only arising from manual labor." The contract now before us does not come within the scope of the necessary implication of the statute of 1869. The subject-matter of the contract was neither the manual labor of the appellant from which she could derive earnings, nor did it have reference to any separate business or trade in which she was engaged as proprietress, and out of which earnings would accrue to her. If she had, during the lifetime of Mrs. Bogart, refused to furnish the home and support, she could not, by force of this statute, have been compelled to do so, or to respond in damages.

The act of 1861 conferred upon married women the right to hold, own, possess and enjoy, the same as though they were sole and unmarried, their sole and separate property, owned at the time of the marriage, or acquired during coverture in good faith from persons other than their husbands, by descent, devise or otherwise. This act has been held by implication to confer on them power to make contracts necessary for the use and enjoyment of their separate property. *Carpenter v. Mitchell*, 50 Ill. 471; *Cookson v. Toole*, 59 id. 515; *Haight v. McVeagh*, *supra*. We know, however, of no case, in which the separate property of the wife was not involved, and in which no question of personal earnings arose, wherein it has been decided that a *feme covert* may make a valid and binding contract. We have, of course, no reference to contracts made under statutes enacted subsequent to the date of the contract under consideration. In this case a married woman, living with her husband and under his roof and control, assumed to make a contract that would bind her to furnish a person with a home in the family, and to support such person for life. Such agreement had no reference to, or connection with, any separate property owned by the wife, and it appears that she had no such property of any kind, either real or personal.

The question is suggested whether, as the contract of appellant was fully executed, the contract of the deceased may not be sustained as an executory contract upon the ground that it had a valuable con-

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sideration. A contract may be defined to be an agreement between two or more parties, upon sufficient consideration, for the doing or not doing of some particular thing. As we have already seen, it is indispensable to every legal contract that there be two contracting parties competent to contract. In the case now before us the element of a consideration may be present, but the equally essential prerequisite of two competent contracting parties is wanting. The latter element is as necessary as the former. The cases referred to by appellant arose under the law of agency, and are cases where the contracts, when made, were void as to the principals for want of authority in the agents to make them, but where, the contracts having been fully performed by the parties of the other part, the principals had received the benefits of such performance, and were held to have ratified the contracts and to be bound to fulfill on their parts. The cases have no application here. In them there were at least two parties competent to bind themselves, while here there was not.

The evidence shows that appellant had no separate property, that her husband furnished the home and support for the deceased and paid all the bills made on her account. If all this was not intended as a gratuity, there was ample remedy therefor, and the claim might have been probated against the estate. Whether it is now barred is a matter not before us. If appellant has any right growing out of the instrument in writing, it must be based on some theory of the case not suggested by the brief and argument filed in her behalf. The comments made upon the moral character and conduct of appellee are not pertinent to the points of law involved in the controversy.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
INDIANA.

SHINN V. STATE.

(84 Ind. 13.)

Criminal law — robbery — fraudulent trick followed by violence.

The complainant was fraudulently induced by two confederates to expose some money in his hand; one of them then snatched it from him and ran away, while the other held him so that he should not pursue, and a struggle between them ensued. *Held*, that this did not constitute robbery.

CONVICTION of robbery. The opinion states the facts.

J. W. Sansberry, for appellant.

T. W. Woollen, Attorney-General, for State.

NIBLACK, J. The prosecution in this case was upon an indictment containing two counts.

The first count charged that Robert Shinn and another person, whose name was to the grand jury unknown, "on the 15th day of August, A. D. 1878, at," etc., "did then and there unlawfully, forcibly and feloniously take from the person of Ithamar McCarty by violence three ten-dollar national bank bills of the value of ten dollars each, and of the aggregate value of thirty dollars, upon a national bank and national banks to the said grand jury unknown, of the personal property, goods and moneys of Jasper N. McCarty."

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The second count charged the same persons with stealing, taking and carrying away three ten-dollar national bank bills, describing such bills in the same manner as in the first count.

Shinn, the appellant, plead not guilty, and upon a trial by a jury was found guilty of the robbery charged in the first count of the indictment. His punishment was fixed at a fine of one dollar and at imprisonment in the State prison for two years.

Disregarding a motion for a new trial the court rendered a judgment of conviction upon the verdict.

One of the causes assigned for a new trial was the insufficiency of the evidence to sustain the verdict, and that constitutes the principal question to which our attention has been invited here.

Ithamar McCarty was the prosecuting witness, and the only witness, as to most of the material facts relied on by the prosecuting attorney for a conviction.

He testified that late in the evening of August 14, 1878, he went from Hancock county to the city of Anderson, in the county of Madison, to sell some flax-seed for his brother, Jasper N. McCarty; that he received a check for thirty-five dollars and eighty-eight cents, the value of the flax-seed, upon a bank of that city; that next morning, after he had received the money on the check, he sat down on the step at a store door to look over the money and to see that it was all right; that while so engaged a man came up in front of him and engaged him in conversation; that this man, who was the person designated in the indictment as the person unknown to the grand jury and who was referred to upon the trial as the "padlock man," made some inquiry as to his (witness) future business intentions, saying that he had for sale a very remarkable padlock, denominated a burglar-proof padlock, or something of that kind, and suggested that he, said McCarty, should become an agent for the sale of this padlock; that this unknown man, after some further conversation, left witness to get a specimen lock for his examination and further information; that after an apparent second effort to find a lock the padlock man came to witness at an appointed place with a lock; that thereupon, he and witness went walking together upon one of the streets, during which time he explained to witness how to unlock this specimen lock, claiming that no person not previously instructed could unlock it; that they soon came to the door of a church where they sat down upon the step in the shade and continued the discussion of the merits of the lock; that soon after they

were thus seated the appellant, who was a stranger to witness, came up in front of them and inquired when the train left for Rushville, remarking that his father who lived in Marion, in Grant county, had had two horses stolen and that he was in pursuit of the horses; that the padlock man then handed the lock to the appellant with a remark that if his father had had such a lock on his barn as that, his horses would not have been stolen; that the appellant taking the key made a seeming effort to unlock the lock, but failing, said the lock was a sham; that being assured by the padlock man that it was a very easy thing to do if he only understood its workings, the appellant made another apparent effort to unlock the lock, but again failing he handed the lock back, saying he would bet fifty dollars there was not a man in the State who could unlock that lock; that witness pulled out of his pocket three ten-dollar national bank bills, and holding them in his hands remarked that if he were a betting man he would bet that amount that he could unlock the lock very easily; that at that point witness became suspicious that the padlock man was too anxious for him to bet, and was about to return these bills to his pocket when the padlock man snatched them from his hand and handed them over to the appellant, who started off on a run; that the padlock man then took witness by the arms and shoved him over the steps in front of the church; that witness getting loose ran after appellant and caught him by the arm and demanded a return of the money; that the padlock man again caught hold of witness, about which time the appellant handed back to witness a ten-dollar bill, requesting him to accept it as a compromise; that witness still hung on to appellant insisting on a return of the remaining twenty dollars, when another tussle ensued, in which all three engaged, but the attention of others being attracted by this time, the padlock man very suddenly disappeared from the city and the appellant was soon afterward arrested.

This we regard as a fair synopsis of so much of the testimony of the prosecuting witness, as is necessary to indicate the character of the transaction for which the appellant was convicted, as above set forth.

The synopsis above given embraces the substantial portions of the testimony which went most strongly against the appellant.

It is said that the principle of robbery is violence, but it has been held that actual violence is not the only means by which a robbery may be effected; that it may also be accomplished by fear, which

the law considers as constructive violence. *Donnally's Case*, 1 Leach, 229; *Long v. The State*, 12 Ga. 293.

With respect to the degree of actual violence necessary to constitute a robbery, more than a sudden taking or snatching must be shown.

Archbold's Treatise on Criminal Practice and Pleading gives several illustrations in support of this rule, and concludes: "So that the rule appears to be well established, that no sudden taking or snatching of property from a person unawares is sufficient to constitute robbery, unless some injury be done to the person, or there be some previous struggle for the possession of the property, or some force used in order to obtain it." Vol. 2, p. 1290; see, also, 2 Whart. Crim. Law, § 1701.

The taking must not precede the violence or putting in fear. In other words, the violence or putting in fear will not make a precedent taking, effected clandestinely, or without either violence or putting in fear, amount to a robbery. 2 Russ. on Crimes, 108; 2 Archb. Crim. Prac. and Plead. 1289.

Applying the well-established rules of law thus enunciated to the cause in hearing, it is manifest that a case of robbery was not made out against the appellant on the evidence. *Brennon v. The State*, 25 Ind. 403; *Hart v. The State*, 57 id. 102.

The evidence tended to show the fraudulent and felonious obtaining of money from the prosecuting witness by means of a previously-arranged trick or contrivance, but did not sustain the charge of robbery contained in the indictment. *Huber v. The State*, 57 Ind. 341.

The judgment is reversed, and the cause remanded for a new trial. The clerk will give the proper notice for the return of the prisoner.

TAYLOR v. FICKAS.

(64 Ind. 167.)

Water and water-course — obstruction of surface overflow of water-course — action — administrator.

The owner of land planted a row of trees on his own land, and along the division line between his land and that of an adjoining proprietor, the effect of which was to obstruct the passage of drift-wood carried upon the land of the adjoining proprietor, by the overflow of a water-course adjacent to the lands of both proprietors, to the injury of such adjacent land. *Held*, that no action would lie therefor.*

An administrator has no right of action for injury to the land of his intestate.

ACTION for obstruction of water. The opinion states the case. The defendant had judgment below.

A. L. Robinson, for appellant.

J. M. Shackelford and *R. D. Richardson*, for appellee.

BIDDLE, J. The appellant entitled this case, "Samuel C. Taylor, administrator of the estate of Martha E. Taylor, deceased," etc., and filed the following complaint:

"Samuel C. Taylor, administrator aforesaid, complains of John H. Fickas, and says, that on the 11th day of December, 1866, the said Martha E. Taylor, whose name was then Martha E. James, became the owner in fee simple, and entered into possession of the following-described tract of land, viz.: forty-five and ninety-one one-hundredths acres, out of the middle of the north-east quarter of section No. eleven (11), in township No. seven (7) south, range No. ten (10) west, being that part of said quarter section set off and allotted to Mrs. Emily R. James, as widow of Nathaniel J. James, in a suit for partition in the Court of Common Pleas of said county,

* To same effect: *Hoyt v. City of Hudson* (27 Wis. 656), 9 Am. Rep. 473. *Contra*: *Holle v. Clifton* (22 Ohio St. 247), 10 Am. Rep. 732; *Ogburn v. Connor* (46 Cal. 346), 13 Am. Rep. 213. A municipal corporation may not, by change of grade of street, turn surface water on adjacent land: *Pettigrew v. Village of Evansville* (25 Wis. 223), 3 Am. Rep. 50; *City of Aurora v. Reed* (57 Ill. 29), 11 Am. Rep. 1; *City of Dixon v. Baker* (23 Ill. 518), 16 Am. Rep. 591, and note, 593; *Lynch v. Mayor of New York* (N. Y. Ct. App.), 19 Alb. L. J. 173.

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during the November term, 1859, as appears by the report of commissioners in said suit and the plat filed with the said report, all of which is recorded in Partition Record No. 1 on page No. 108, to which the plaintiff refers for a more perfect description of said land situated in said county, and that the said Martha E. continued to own and possess the said land until the 7th day of December, 1874, when she departed this life, intestate, leaving the said plaintiff, her husband, and sole heir of her said estate, and afterwards, to wit, on the 11th day of April, 1877, the plaintiff was in due form appointed administrator of the estate of the said decedent.

“The plaintiff further avers that during the year 1862 the defendant became the owner and entered into possession of the following-described tract of land, viz. : Fifty-nine acres off of the west side of the said north-east quarter of said section eleven (11) lying west of and adjoining the said land of decedent; that said tracts of land lie in strips, each half a mile in length running north and south, and are situated near the Ohio river, in said county, and are a part of the overflowed bottom lands near and adjacent to said river, and that from time immemorial a large extent of country in the vicinity of said tracts of land, and including the same, has been and still is liable to be overflowed with water from the said river after and during excessive rains in the valley of the said river; that during said times of high water and overflow the water from the said river runs over the said tracts of land with a strong and rapid current, the general current of the same running from east to west, first over the land of decedent and then over that of the defendant, the water in said current over said land varying in depth from two feet to ten feet, and that the water (which is in fact a portion of the said river) has run in that manner during seasons of high water and during times of overflow from time immemorial, and that the same would have continued so to run but for the wrongful acts of the defendant hereinafter described.

“The plaintiff further avers that during all the times of high water and overflow of said river great quantities of drift-wood have floated in the said current over the said tracts of land without injury to the same, and would have continued so to float but for the wrongful acts of the defendant hereinafter described.

“The said tracts of land during the years hereinafter named were cleared and in cultivation and of great value, to wit, of the value of \$100 per acre; that the defendant to protect his said tract of land

from drift-wood in the year 1864 wrongfully and unlawfully planted, and has since continued and maintained, a row of trees on his said land, on or near and within a few inches of the line dividing said tracts of land, in a continuous row or line running north and south for a distance of half a mile, the said trees being planted only two feet apart along the whole length of the line dividing said tracts of land

“That at the time when the decedent purchased and entered into the possession of the tract of land first-above described the said trees were of small size, having recently been planted and were not of sufficient size to form the obstruction of said current as hereinafter described; that during eight years, to wit, from the year 1867 to the year 1874, both included, the said trees so wrongfully and unlawfully planted and maintained by the defendant having grown to a sufficient size and strength prevented the drift-wood floating in the said current during times of high water and overflow in said river from flowing over and away from the land of decedent and from the land of the defendant. And during all those years the drift wood which would have floated over and away from said decedent's land, and from the defendant's land, lodged upon and against the said trees, and upon said decedent's land, in large quantities, so that a dam has been and was formed against said trees and upon decedent's lands, by means whereof a large area of said land, to wit, five acres, became covered with trees, logs, stumps, brush and trash, which floated and lodged there during said years in times of high water and overflow, and covered the said five acres with said drift-wood and trash, to the depth of from two feet to ten feet, and which so remained covered at the time of the decease of the said Martha E., by reason whereof the said land became and was worthless and of no value.

“And the plaintiff further avers, that by the obstruction aforesaid, the water was prevented from flowing off of said land of decedent, and remained stagnant, and the decaying wood and trash, so piled upon the said land by the means aforesaid, rendered the same unhealthy and unfit for a human habitation.

“By means whereof the plaintiff avers, that the said decedent sustained damages to the amount of \$2,000, for which he demands judgment, and for all other proper relief.”

The appellee filed a demurrer to the complaint, for that it does not state facts sufficient to constitute a cause of action.

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The demurrer was sustained, the parties stood by their pleadings, and the court rendered final judgment for the appellee.

If this complaint was brought solely in the right of an administrator, the action would not lie. An administrator cannot sue for an injury to the freehold. *Emerson v. Emerson*, 1 Vent. 187; Toller on Executors, 159; *Hill v. Penny*, 17 Me., 409. By the common law, lands went to the heir, not to the administrator. 2 Bl. Com. 201. In the State of Indiana, the administrator has no right in the lands that descended to the heir, except upon the contingency that the personal estate is insufficient to pay the debts against the deceased, or in the absence of heirs or devisees. 2 R. S. 1876, pp. 519, 535, §§ 75, 110. And this is the general American doctrine. The appellant cannot maintain the case as an administrator; but in the body of the complaint he avers that he is the sole heir of the decedent, and that the lands alleged to have been injured have descended to him. As an heir, he may bring the action.

The property in water that passes along and through a water-course which has a bed, channel and banks, where it usually flows, is a mere usufruct interest, continuing only while the water is passing over the lands of the owner. He has the right to receive it where the water-course, in its natural channel, enters his land, and to use it while it is passing over his lands; but he is required to return it to its channel when it leaves his land. 2 Bouv. Law Dict., p. 656; Ang. on Watercourses, §§ 94, 135. The property in the lost water that percolates the soil between the surface of the earth, in hidden recesses, without a known channel or course, and property in the wild water that lies upon the surface of the earth, or temporarily flows over it as the natural or artificial elevations or depressions may guide or invite it, but without a channel, and which may be caused by the falling of rain or the melting of snow and ice, or the rising of contiguous streams or rivers, fall within the maxim that a man's land extends to the center of the earth below the surface, and to the skies above, and are absolute in the owner of the land, as being a part of the land itself. Ang. on Watercourses, § 108, and notes and authorities there cited. See, also, *New Albany and Salem R. R. Co. v. Peterson*; 14 Ind. 112, and *City of Greencastle v. Hazelett*, 23 id. 186.

In the complaint before us there is no averment of any water-course except, indeed, by way of parenthesis, that the place during floods is a part of the Ohio river, but the facts averred clearly show

that it is not upon the bed of the river, nor within its channel, nor between its banks; in short, that it is no part of a water-course but that the flow over the entire surface of the land is occasioned by temporary causes and is not usually there. The rights of the appellee, therefore, are such as a proprietor may have in surface water, which, as we have seen, is a part of his land, and the injuries or inconveniences which the appellant is alleged to have suffered are such as arise from the changes, accidents and vicissitudes of natural causes. These rights and liabilities are so well defined by BIGELOW, Ch. J., in the case of *Gannon v. Hargadon*, 10 Allen, 106, that we adopt the definition as our own.

“The right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is so situated with reference to that of adjoining owners that an alteration in the mode of its improvement or occupation in any portion of it will cause water which may accumulate thereon by rains and snows falling on its surface, or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands or pass into or over the same in greater quantities or in other directions than they were accustomed to flow.”

Again, from the same cause :

“The obstruction of surface water or an alteration in the flow of it affords no cause of action in behalf of a person who may suffer loss or detriment therefrom, against one who does no act inconsistent with the due exercise of dominion over his own soil.”

In delivering the opinion in the case of *Goodale v. Tuttle*, 29 N. Y. 459, DENIO, Ch. J., said: “And in respect to the running off of surface water caused by rain or snow, I know of no principle which will prevent the owner of land from filling up the wet and marshy places on his own soil for its amelioration and his own advantage because his neighbor’s land is so situated as to be incommoded by it. Such a doctrine would militate against the well-settled rule that the owner of land has full dominion over the whole space above and below the surface.”

The maxim that every one must so enjoy his property as not to injure the property of another, so earnestly insisted upon by the appellee, means no more than that every one must so enjoy his property according to his legal right as not to injure the legal right in

Taylor v. Fickas.

the property of another. It is sometimes impossible for the owner to use his property within his legal right without, in some slight degree at least, injuring the property of another. Such a case is not within the maxim, provided it does not injure a legal right in the property of another.

We adopt the following language from a case cited herein: "The elements being for general and public use and the benefit appropriated to individuals by occupancy, this occupancy must be regulated and guarded with a view to individual rights of all who have an interest in their enjoyment, and the maxim *sic utere tuo ut alienum non lædas* must be taken and construed with an eye to the natural rights of all; and although some conflict may be produced in such uses and enjoyments it is not considered, in judgment of law, an infringement of the right."

In the case of *Chatfield v. Wilson*, 28 Vt. 49, it is said: "The maxim *sic utere tuo ut alienum non lædas* applies only to cases where the act complained of violates some legal right of the party,
* * * and it may be laid down as a position not to be controverted, that an act legal in itself, violating no right, cannot be made actionable on the ground of the motive which induced it."

The case which seems most nearly to support the views of the appellant is *Gillham v. Madison, etc., R. R. Co.* 49 Ill. 484.

The question in that case, as in this, arose upon sustaining a demurrer to the complaint. The facts in that case were as follows: The appellant was the owner of a tract of land less elevated than the land in the neighborhood, from which all the water that fell upon it from rains or otherwise flowed on the land, and which, by means of a depression in the surface, ran off his land to adjoining lands, and thence into a natural lake. The appellee made a large embankment on the line of the appellant's land, entirely filling this channel, thereby throwing the back-water on the appellant's land.

In this case the complaint was for obstructing a depression in the ground, or a channel, not for obstructing the entire surface for a half mile, where no channel is alleged, as in the case before us.

The true doctrine in such a case, we believe, was expressed by the chancellor, in the case of *Earl v. De Hart*, 1 Beas. 280: "If the face of the country is such as necessarily collects in one body so large a quantity of water, after heavy rains and the melting of large bodies of snow, as to require an outlet to some common reservoir,

and if such water is regularly discharged through a well-defined channel, which the force of the water has made for itself, and which is the accustomed channel through which it flows, and has flowed from time immemorial, such channel is an ancient natural water-course."

It is plain that the facts averred in the complaint we are considering do not fill the law as expressed above.

The doctrine contended for by the appellant, applied to the vast alluvial regions — so generally level, and subject to occasional inundations — bordering upon the Ohio river, and lying along other rivers and large streams within this State, would very much embarrass agriculture and general improvement, by preventing proprietors of lands from securing their fences by planting trees, or by other permanent methods, and in some instances, perhaps, render large portions of our richest soil useless. While the owners of lands may not obstruct water-courses to the injury of others, they must be permitted to fence and cultivate their fields and improve their lands in the way which best subserves their interests, without being responsible for the accidents of floods, or the shiftings of surface water occasioned thereby, although sometimes, slight and temporary injuries may result therefrom to adjoining owners. These are accidents which must be borne alike by all.

We think the law has thus wisely discriminated between the rules which apply to water-courses, and those which apply to surface waters. The following authorities, in addition to those cited above, support this opinion: *Shields v. Arndt*, 3 Green. Ch. 234; *Chasemore v. Richards*, 2 H. & N. 168; *S. C.* 5 id. 982; *City of Bangor v. Jansil*, 51 Me. 521; *Greeley v. Maine Central R. R. Co.*, 53 id. 200; *Kauffman v. Griesemer*, 26 Penn. St. 407; *Bates v. Smith*, 100 Mass. 181; *Emery v. City of Lowell*, 104 id. 13; *Luther v. Winnisimmet Co.*, 9 Cush. 171; *Ashley v. Wolcott*, 11 id., 192; *Parks v. City of Newburyport*, 10 Gray, 28; *Flagg v. City of Worcester*, 13 id. 601; *Dickinson v. City of Worcester*, 7 Allen, 19; *Wheeler v. City of Worcester*, 10 id. 591; *Goodale v. Tuttle*, 29 N. Y. 459; *Wagner v. Long Island R. R. Co.*, 5 T. & C. 163; *Buffum v. Harris*, 5 R. I. 243; *Beard v. Murphy* 37 Vt. 99; *Swett v. Cutts*, 50 N. H. 439; *S. C.*, 9 Am. Rep. 276; *Conhocton Stone Road Co. v. The Buffalo, New York and Erie R. R. Co.*, 3 Hun, 523; *Chasemore v. Richards*, 7 H. L. Cas. 349; *Bowlsby v. Speer*, 31 N. J. 351; *Rawstron v. Taylor*, 11 Exch. 369; *Hoyt v. City of Hudson*, 27 Wis. 656; *Barnes*

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v. *Sabron*, 10 Nev. 217; *Imler v. City of Springfield*, 35 Mo. 119; S. C. 17 Am Rep. 645; *Jones v. Hannovan*, 55 Mo. 462.

The court did not err in sustaining the demurrer to the complaint.

The judgment is affirmed, at the costs of the appellant.

Petition for a rehearing overruled.

MILLNER V. EGLIN.

(64 Ind. 197.)

Evidence—comparative weight of oral, and depositions.

An instruction that "other things being equal in regard to witnesses, the testimony of those examined in open court is entitled to greater weight than the testimony of witnesses embodied in depositions," is erroneous.

ACTION to set aside a deed. The opinion states the facts. The defendant had judgment below.

T. J. Merrifield and *W. Johnston*, for appellants.

A. L. Jones, *C. Baker*, *T. A. Hendricks*, *O. B. Hord* and *A. W. Hendricks*, for appellees.

NIBLOCK, J. (After stating the pleadings, etc.)

The evidence upon the trial consisted of certain instruments in writing, of oral testimony and of the depositions of witnesses. Depositions formed a considerable portion of the evidence introduced by the plaintiffs. Questions as to the weight of evidence, and as to the relative credibility of witnesses, arose upon the trial and went to the jury with the evidence in the cause. Concerning those questions the court instructed the jury as follows:

"In weighing the evidence of witnesses you are to look on their means of knowledge and at their honesty in the light of all the corroborating and surrounding facts and circumstances in the case, and in this connection you have a right to look at the appearance of the witnesses upon the stand; and because of this, other things being equal in regard to witnesses, the testimony of those examined in open

court is entitled to greater weight than the testimony of witnesses embodied in depositions."

It is insisted that this instruction is erroneous, that the rule for weighing evidence laid down by it is not recognized by the authorities and has, in reality, no existence as a rule of law.

On the other hand it is contended that the instruction is sustained by the case of *Carver v. Louthain*, 38 Ind. 530; that instruction numbered ninth, ruled upon in that case was, in principle and in substance, a parallel one to the instruction before us. We are, however, of the opinion that the two instructions are not parallel in all essential respects. We think the case of *Carver v. Louthain*, *supra*, taken altogether does not go so far to the disparagement of testimony submitted through the medium of depositions as does the instruction now under consideration. That case does not go to the extent of saying that "other things being equal in regard to witnesses," depositions are entitled to less weight than oral testimony, but went rather to the credibility of conflicting witnesses where the opportunities for applying the usual tests had not been "equal" between the two classes of witnesses referred to.

We know as a matter of fact, from common observation, that in many cases, perhaps in most cases, the testimony of a witness orally given is much more likely to make a decided impression upon a jury than if communicated in the form of a deposition. We also know, in the same way, that in other cases the depositions of witnesses would be more likely to make a favorable impression on the jury than if such witnesses had testified orally before the jury, depending, in every case, upon the intelligence, the peculiarities, the general appearance, and all other circumstances attending each particular witness. These are matters about which the law lays down no general or inexorable rule. They constitute facts for the consideration of the jury in every case in which such questions may arise. We know of no rule of law by which the instruction complained of as above can be sustained. *Nelson v. Vorce*, 55 Ind. 455; *Pratt v. The State*, 56 id. 179.

Upon a review of the case of *Carver v. Louthain*, above referred to, we have come to the conclusion that so much of it as holds that the ninth instruction copied into the opinion was correctly given to the jury in that case must be considered as overruled so far as it may be construed as inconsistent with this opinion. So much of that case as approves the eleventh instruction commented upon by

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it has already, by implication, been overruled. *Greer v. The State*, 53 Ind. 420; *Veatch v. The State*, 56 id. 584.

As what we have said disposes of the case at the present hearing, we will not now consider some other questions discussed by counsel.

The judgment is reversed, with costs, and the cause remanded for a new trial.

RYAN V. CURRAN.

(64 Ind. 345.)

Negligence — contractors — excavation in sidewalk.

The plaintiff sued the owner of a city lot and a person who had contracted with him to erect a building thereon, for injuries alleged to have been sustained by her through their negligence in making and leaving open an excavation in the sidewalk in front of the premises. The owner answered that the premises were at the time in the exclusive possession and control of the co-defendant who had contracted with him to erect a building thereon, and who was a skillful, reliable and competent builder. *Held*, that the answer was sufficient.*

ACTION of damages for negligence. The opinion states the case. The plaintiff had judgment below as to the appellant Ryan.

D. Turpie and *H. D. Pierce*, for appellants.

J. W. Gordon, *R. N. Lamb*, *S. M. Shepard*, *A. G. Porter*, *W. P. Fishback* and *G. T. Porter*, for appellees.

Howe, Ch. J. This was an action by the appellee, Barbara Curran, as plaintiff, against the appellants, James B. Ryan, Elijah Victor and Stephen Knowlton, and her co-appellees, Deloss Root, Jerome B. Root, Frederick Nolke, Frank Smallwood and Frank Windesheimer, as defendants, in the court below.

In her complaint the appellee Barbara Curran alleged, in substance, that on or about the 1st day of September, 1874, the appellant James B. Ryan was the owner, and in the possession and control of a lot of ground and its appurtenances at the north-west corner of Tennessee street and Indiana avenue, in the city of Indianapolis,

* To same effect, *Riley v. State Line Steamship Co.* (29 La. Ann. 791), 29 Am. Rep. 342.

in Marion county, Indiana, and was building and erecting a block of houses thereon, fronting on and along both said street and avenue, and was about finishing and completing the said block; that in the excavation for the cellar of said block, on said avenue, and for the entrance to said cellar and for other purposes, the appellants had digged down and excavated said Indiana avenue and the north sidewalk thereof, to the depth of, to wit, fifteen feet on the outside of the cellar wall of said block, fronting said avenue, and had erected another wall in said sidewalk, at a distance of, to wit, five feet from and parallel to said cellar wall, and had then and there, by means of iron grating or bars, covered up a part of the space between the wall of said block and the said wall south thereof, at a level with said sidewalk, and so as to constitute a part of the same; that after having thus covered up a part of the space and excavation between the said walls, the defendants carelessly, negligently, wrongfully and unjustly left the rest of said space and excavation, between the said walls open, and failed and neglected to place any railing or guards around such open space, but carelessly and negligently left the same open and unguarded in said sidewalk and on a level therewith, so as to leave a very deep, abrupt and dangerous chasm in said sidewalk, to the great danger of the lives and limbs of all the good citizens of said city and State, walking and going on and over said Indiana avenue and said sidewalk, on the north side thereof; that on the day and year aforesaid, in the night-time of said day, the appellee, Barbara Curran, was walking upon and along said sidewalk of said avenue, and upon said iron bars which then and there constituted a part of said sidewalk, when owing to the aforesaid negligence, carelessness and wrongful omission and acts of the defendants, she was precipitated, without fault or negligence on her part, from said iron railing or bars placed as aforesaid by said defendants, into the said excavation and space between the said walls, and fell from the level of said sidewalk to the depth of said excavation, falling and striking on the bottom thereof with great force and violence, by means whereof she was greatly injured, and was sick and sore for a long time, and suffered greatly, etc., and paid out, to wit, \$500 for medical and surgical treatment, and suffered damages in the sum of \$5,000, for which she prayed judgment, and for other proper relief.

To this complaint the appellant, James B. Ryan, separately answered in two paragraphs, the first being a general denial, and the second setting up affirmative matter.

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To the second paragraph of said answer, the appellee, Barbara Curran, demurred, upon the ground that it did not state facts sufficient to constitute a defense to her action, which demurrer was sustained by the court, and to this decision the appellant, Ryan, excepted.

The appellants, Victor and Knowlton, jointly answered in two paragraphs : First, a general denial ; and second, a special defense. To the second paragraph of this answer, the appellee, Barbara Curran, replied by a general denial.

The defendants, Deloss and Jerome B. Root, jointly answered the complaint by a general denial thereof.

The appellants, Nolke, Smallwood and Windesheimer, jointly answered by a general denial of the complaint.

The issues joined were tried by a jury in the court below at Special Term, and a verdict was returned for the appellee, Barbara Curran, assessing her damages at \$4,000 against the appellants, Ryan, Victor and Knowlton, and finding for the other defendants, Deloss Root, Jerome B. Root, Nolke, Smallwood and Windesheimer.

The appellant Ryan separately, and the appellants Victor and Knowlton jointly, moved the court, at Special Term, for a new trial of this cause, which motions were severally overruled, and to these rulings they respectively excepted. The court, at Special Term, rendered judgment on the verdict, from which judgment the appellants appealed to the court below in General Term. In this latter court, the judgment of the Special Term was affirmed, and from this judgment of affirmance this appeal is now here prosecuted.

In this court the appellants have assigned as error, the judgment of the court below in General Term, affirming the judgment of said court at Special Term. This alleged error brings before this court the questions which fairly arise under the errors assigned by the appellants in the court below in General Term, which errors were as follows:

1. The decision of the court at Special Term, in sustaining the demurrer of the appellee, Barbara Curran, to the second paragraph of the separate answer of the appellant, James B. Ryan ; and
2. The decision of said court at Special Term, in overruling the motion of the appellant, Ryan, for a new trial.

The appellant, James B. Ryan, in the second paragraph of his separate answer, alleged, in substance, that he admitted he was the owner of the lot of ground described in the complaint, and the fact

that the appellee, Barbara Curran, was injured by falling into the cellar of the building then being erected thereon; but the appellant, Ryan, averred that the appellants, Victor and Knowlton, skillful, reliable and competent builders, were engaged in the erection of a brick building on said lot, having been contracted with by the appellant, Ryan; that the said builders and contractors were to have, and did have and exercise, exclusive control and direction of the digging of the cellar, the erection of the walls therein and around the same, together with the passageways into the same, and the erection of the entire building to its completion; and the appellant, Ryan, averred that neither he, nor any agent, servant or person in his employ, or under his direction or control, had any charge or management or control thereof; and that the acts, deeds, matters and things, alleged to have been the cause of the injury and damage of the appellee, Barbara Curran, were in no respect the acts of the appellant, Ryan, nor of his servants or agents, nor of any person in his employ; and that said work was done under a special contract in writing with the appellants, Victor and Knowlton, which said contract was filed with said paragraph of answer, marked "Exhibit A."

The first question presented for our consideration and decision, by the record of this cause and the error assigned thereon may be thus stated:

Were the facts alleged in the second paragraph of the separate answer of the appellant, James B. Ryan, sufficient to constitute a complete defense in his behalf, to the action of the appellee, Barbara Curran?

It seems very clear to us, that this question must be answered in the affirmative. We are aware that this conclusion is apparently in conflict with the opinion of this court in the case of *Silvers v Nerdlinger*, 30 Ind. 53. In that case it appears, from the opinion of the court, that Nerdlinger and another owned a lot in the city of Fort Wayne, on which lot the appellant, Silvers, had contracted with the appellees to erect for them a building, and to that end they had delivered to him the exclusive possession of said lot. During the erection, and before the completion of the building, one Charles Dwelly, in passing over the sidewalk in front of said building—in which sidewalk an excavation had been made for the construction of the walls and cellarways of the building, and had been left in an unguarded condition—had fallen into the pit, and had been injured thereby. In an action for that purpose, Dwelly had recovered

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damages for the injuries he sustained, from the appellees, the owners of the lot, which damages they had paid. The appellees, the owners of the lot, then brought an action against the appellant, the contractor for the building, to recover from him the damages they had paid Dwelly, and they obtained judgment therefor in the Circuit Court. From this judgment Silvers, the contractor for the building appealed to this court, and this is the case reported in 30 Ind. 53, *supra*.

It will be seen from this statement of the case cited, that the point in judgment in that case was the right of the owners of the lot to recover from the contractor the damages which they had been compelled to pay by reason or on account of the alleged negligence of the contractor. This is not, but is widely different from the question presented for decision by the second paragraph of the separate answer of the appellant, Ryan, in the case at bar. The question here presented is, whether or not the appellant, Ryan, as the owner of the lot, under the facts stated in the second paragraph of his answer, was liable in damages to the appellee, Barbara Curran, for the injuries received by her in the manner stated in her complaint? The liability of the owner of the lot to the party injured in such a case, was not the question before the court in the case of *Silvers v. Nerullinger*, *supra*; but ELLIOTT, J., devoted much of his opinion in the decision of that case, to the consideration of that question. The opinions of that learned judge on any legal question are entitled to very high respect; but his opinion in the case cited, upon the question now under consideration, which was not involved in that case, cannot be regarded as an authority decisive of that question.

The contract in writing between the appellant, Ryan, and his co-appellants, Victor and Knowlton, which was filed with the second paragraph of Ryan's separate answer, was not the foundation of the defense stated in said paragraph. Therefore the written contract, which can only be regarded as evidence tending to sustain the averments of the paragraph, did not become a part of the paragraph by being filed therewith, and cannot be considered in determining the sufficiency of the facts stated therein to constitute a defense to the action. *Excelsior Draining Co. v. Brown*, 38 Ind. 384; *Trueblood v. Hollingsworth*, 48 id. 537; *Wilson v. Vance*, 55 id. 584; and *Schuri v. Stephens*, 62 id. 441.

Before considering the sufficiency of the facts alleged in the second paragraph of Ryan's answer, we may properly premise that it is

evident from the averments of the complaint, that the appellee, Barbara Curran, did not ground her alleged cause of action against Ryan solely upon the fact of his ownership of the lot described in her complaint. The gist of her cause of action, as stated and reiterated in her complaint, was the alleged negligence of Ryan and his co-defendants, in covering the area or cellarway in part, so as apparently to invite travel thereon, and in leaving the residue of the area or cellarway uncovered and unguarded. It cannot be questioned, as it seems to us, that the party, whoever he may have been, who left that area or cellarway in the condition described in the complaint, in a public thoroughfare of a large city, was guilty of gross negligence and was liable in damages under the averments of the complaint, for the injuries sustained by Barbara Curran. But the question for decision under the allegations of the second paragraph of Ryan's answer, admitted to be true by the demurrer thereto, is this: Can it be said, if the facts alleged are true, that the appellee, Barbara Curran, received the injuries complained of, by or through the negligence of the appellant, James B. Ryan?

If it be true, as alleged in Ryan's answer, that the appellants, Victor and Knowlton, had and exercised exclusive control and direction of the digging of the cellar, the erection of the walls therein and around the same, together with the passageways into the same, and the erection of the entire building to its completion, can it be correctly said that the appellee, Barbara Curran, received the injuries complained of, by or through the negligence of Ryan? If it be true, as alleged in Ryan's answer, that neither Ryan nor any agent, servant or person in his employ or under his direction or control, had any charge or management or control of the digging of the cellar, the erection of the walls therein and around the same, or of the passageways into the cellar, or of the erection of the building to its completion, can it be correctly said that the alleged injuries of Barbara Curran were received by her, by or through Ryan's negligence? If it be true, as alleged in Ryan's answer, that the acts, deeds, matters and things alleged by Barbara Curran in her complaint, to have been the cause of her injury and damage, were in no respect the acts of Ryan, nor of his servants or agents, nor of any person in his employ, can it be said, with any degree of truth or accuracy, that the alleged injuries of Barbara Curran were caused by or resulted from the negligence of Ryan?

It seems very clear to us that each and all of these questions must

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be answered in the negative. The truth is, and it cannot be gainsaid, that the averments of the second paragraph of Ryan's answer constitute a full and complete defense to every fact alleged in the complaint except the facts of Barbara Curran's injury and Ryan's ownership of the lot and building. It need hardly be said that these excepted facts alone would not give Barbara Curran any cause of action against the appellant, Ryan. The *gravamen* of the complaint in this case was the alleged negligence of the defendants, but the facts alleged in the second paragraph of Ryan's answer show very clearly, we think, that the negligence complained of was not Ryan's negligence.

It was alleged, as we have seen in the second paragraph of Ryan's answer, that the appellants, Victor and Knowlton, "skillful, reliable and competent builders," had and exercised exclusive control and direction, under a special contract in writing with the appellant, Ryan, over the digging of the cellar, the erection of the walls therein and around the same, together with the passageways into the same, and the erection of the entire building to its completion. In such a case it is very clear, we think, that the appellants, Victor and Knowlton, cannot be regarded, in any proper sense, as the agents or servants of Ryan, except as to the specific results which they undertook or contracted to produce; and the law is now well settled that the employer of a builder or contractor in such a case is not responsible to third persons for the negligence of the builder or contractor, or for the negligence of the latter's servants, agents or sub-contractors in the execution of the work. Ryan's contract with Victor and Knowlton for the erection of his block of buildings was a lawful contract for a lawful purpose. The work contracted for was not a nuisance *per se*, and the doctrine is now firmly established, that unless the work is in itself a nuisance, the owner of the real estate who has contracted with "skillful, reliable and competent builders" will not be liable to third persons for injuries which result from the negligence of the builders or contractors, or of their servants, agents or sub-contractors in the execution of the work. *Hilliard v. Richardson*, 3 Gray, 349; *Linton v. Smith*, 8 id. 147; *Brackett v. Lubke*, 4 Allen, 138; *Barry v. City of St. Louis*, 17 Mo. 121; *Blake v. Ferris*, 5 N. Y. 48; *Pack v. Mayor, etc.*, 8 id. 222; *Kelly v. Mayor, etc.*, 11 id. 432; *Painter v. Mayor, etc.*, 46 Penn. St. 213; *Allen v. Willard*, 57 id. 374; *De Forrest v. Wright*, 2 Mich. 368; *Scammon v.*

City of Chicago, 25 Ill. 424; *Pfau v. Williamson*, 68 Ill. 16; *Shear. & Redf. on Neg.*, § 79, and *Whart. on Neg.*, § 818.

The general proposition to be deduced from the authorities cited is "that one person is not liable for the acts or negligence of another unless the relation of master and servant exists between them; and when an injury is done by a party exercising an independent employment the person employing him is not liable."

We are clearly of the opinion that the matters pleaded by the appellant, James B. Ryan, in the second paragraph of his separate answer, were sufficient to constitute a defense to the cause of action stated by the appellee, Barbara Curran, in her complaint, and therefore, we hold that the court at Special Term erred in sustaining said appellee's demurrer to said second paragraph of answer.

The conclusion we have reached in regard to the sufficiency of the second paragraph of the separate answer of Ryan renders it unnecessary for us, so far as he is concerned, to consider the second error assigned by him in the court below in General Term. In this court the appellants, Victor and Knowlton, appear to have joined with the appellant, Ryan, in the assignment of errors, but they failed to assign any errors in the court below in General Term, and therefore, their assignment of errors here presents no question for decision in their behalf. *Wesley v. Milford*, 41 Ind. 413, and *State ex rel., etc., v. Terre Haute, etc., R. R. Co., ante*, p. 297.

In so far as the decision of this cause is in conflict with the case of *Silvers v. Nerdlinger, supra*, the latter case is overruled.

The judgment is affirmed as to the appellants, Victor and Knowlton, but as to the appellant, James B. Ryan, the judgment is reversed at the costs of the appellees, and the cause is remanded with instructions to overrule the demurrer to the second paragraph of Ryan's answer, and for further proceedings in accordance with this opinion.

Petition for a rehearing overruled.

NOLL v. Smith.

NOLL v. SMITH.

(64 Ind. 511.)

Negligence—signing an instrument capable of change by separation to a note.

One who signs and delivers a contract, in form like a negotiable promissory note, but with a condition limiting his liability so appended as to be capable of separation, leaving an apparently perfect note, is liable to an innocent indorser of such note who acquires the same for value and before maturity, after such separation has been made by the payee, without the maker's knowledge.*

ACTION on promissory notes. The opinion states the facts. The plaintiff had judgment below.

F. M. Sutton and J. W. Sutton, for appellant.

J. McCabe, for appellee.

NIELACK, J. William C. Smith, as the indorsee and holder, sued Benjamin Noll on two promissory notes, as follows :

‘\$180. WARREN COUNTY, IND., *May* 11, 1875.

“Nine months after date, I promise to pay to the order of Charles DeWolf, at the First National Bank of Attica, Indiana, one hundred and eighty dollars, with interest at the rate of ten per cent per annum from date, value received, without any relief from valuation or appraisement laws. The drawers and indorsers severally waive presentment for payment, protest and notice of protest and non-payment of this note, or before if made from the sale of machine.

“BENJAMIN NOLL.”

“\$180. WARREN COUNTY, IND., *May* 11, 1875.

“Nine months after date, I promise to pay to the order of Charles DeWolf one hundred and eighty dollars, payable at the First National Bank of Attica, Indiana, or before if made from the sale

*To same effect, *Brown v. Reed* (79 Penn. St. 370), 21 Am. Rep. 75; *Garrard v. Haddon* (67 Penn. St. 32), 5 Am. Rep. 412; *Rainbolt v. Eddy* (34 Iowa, 440), 11 Am. Rep. 152, and note, 153; *Thom v. Smith* (63 Ill. 331), 14 Am. Rep. 120. *Contra*: *Holmes v. Trumfer* (23 Mich. 437), 7 Am. Rep. 651, and note, 669; *Greenfield Savings Bank v. Stowell* (123 Mass. 196), 25 Am. Rep. 67.

of the machine, value received, without any relief from valuation or appraisement laws. Interest at ten per cent from date.

“ BENJAMIN NOLL.”

Both these notes were indorsed to the plaintiff.

The complaint was in two paragraphs, one paragraph on each note, and separate demurrers were overruled to both paragraphs.

The defendant answered in three paragraphs:

1. Admitting the execution of the notes, but averring that there was a condition annexed to both notes, that they were not to be paid unless the defendant sold machines, known as “ Charles Green’s Check Rower,” for planting corn, equal to the amounts of said notes, and within the time limited for the payment thereof; that said condition and notes were written on the same paper; that said notes have been altered, in this, that the said condition has been taken off said notes, since the signing and delivery thereof, by some person unknown to, and without the knowledge or consent of, the defendant.

2. Averring that the notes sued on were given to vend “ Charles Green’s Check Rower,” a machine for planting corn, in a certain township in Warren county; that when said notes were executed, they had a condition annexed to them that they were not to be paid if defendant’s sales of said machines, within the time limited for the payment of such notes, were not equal to the amounts of the notes; that said notes and condition were written on the same paper, and were delivered as one instrument; that said condition has since been taken off from said notes, without the knowledge or consent of the defendant, by some person unknown to him. Wherefore the notes sued on are not the instruments in writing executed and delivered by the defendant.

3. Setting up that the notes sued on were given for the right to vend “ Charles Green’s Check Rower,” a machine above described, and that the words in said notes, “ or before, if made from the sale of the machine,” had reference to the sale of said machine; that said notes had a condition annexed thereto, that they were to be paid within the time limited or before, if the profits upon the sales of machines equaled the amounts of the notes; that said condition fully set forth the meaning of said words, “ or before, if made from the sale of the machine;” that the notes sued on were not the instruments signed and delivered by the defendant, because said condition has since been taken off, without the defendant’s knowledge or consent.

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The plaintiff demurred to each paragraph of the answer, and his demurrer was overruled to the first and second paragraphs, and sustained to the third paragraph.

The plaintiff then replied to the first and second paragraphs of the answer, that the First National Bank of Attica, at which the notes in suit were payable, was a national bank, having an actual existence and doing business in this State at the time said notes were executed, which facts were known to the plaintiff when said notes were indorsed to him, and that said bank still existed and continued to do business in this State; that the plaintiff became the purchaser of said notes in good faith and for a valuable consideration, before their maturity, in the regular course of his business, and without any knowledge whatever, on his part, of the facts set up in said paragraphs of the answer; that if any condition was annexed to said notes as alleged, it was either written on a separate paper, or if written on the same paper, so written and formed as to be unmistakably intended, from the appearance thereof, to constitute a separate instrument from each of said notes, as if written on a separate paper because both of said notes were in the form and similitude of ordinary printed blanks for promissory notes, filled up in writing; that the printed blanks had been so formed as to leave a dotted line at the bottom of each, for the signature of the maker of such notes, in which the defendant's name was placed in each of said notes; that outside the body of said notes there was printed a plain and distinct border, by means of two distinct lines close together; that the condition set up by the defendant was not written either upon the back or face of said notes, or either of them, or upon the white space left upon said notes outside of the black border lines above described, and if written on the same paper with the notes, was written so far away from said black line border as to leave the white space aforesaid untouched, and to allow any person to separate said condition from both of said notes, leaving each of them perfect in form and appearance as regular commercial paper; that such was the form and appearance of said notes when he, the plaintiff, purchased the same; that the defendant had been guilty of gross negligence in putting said notes in circulation, trusting the persons in whose hands they might come not to remove said condition, and not to put such notes on the market as commercial paper, with such condition detached.

The defendant demurred to this reply, but his demurrer was overruled.

The cause being submitted to the court for trial, there was a finding and judgment for the plaintiff.

Errors are assigned:

1st. On overruling the demurrer to the complaint.

2d. On the sustaining of the demurrer to the third paragraph of the answer.

3d. On the overruling of the demurrer to the reply.

The appellant, in his argument here, has not discussed the sufficiency of the complaint, or of the third paragraph of his answer. We are hence relieved from the consideration of the questions raised by the first and second assignments of error. See, however, *Walker v. Woollen*, 54 Ind. 164.

We understand the general rule to be that the removal or detachment of a material condition annexed to, or forming a part of, a negotiable note, without the knowledge or consent of the maker, will ordinarily be a sufficient defense to such note, even in the hands of an innocent holder, and especially when such removal or detachment is made under circumstances which put the purchaser of the note fairly upon his inquiry as to the altered condition of the note, and this we construed to be the doctrine of the case of *Cochran v. Nebeker*, 48 Ind. 459, cited and discussed by the appellant; but that, when the note and condition are negligently so executed by the maker that the condition may easily be removed, without in any manner mutilating or defacing the note, and the note is thus, without objection, put in circulation in that form, the maker cannot be heard to deny his liability to pay the note in the hands of an innocent holder, notwithstanding the condition may have been detached from it before such innocent holder became the owner of it. Such was, in substance, the decision of this court in the case of *Cornell v. Nebeker*, 58 Ind. 425. See, also, *Woollen v. Ulrich*, *ante*, p. 120, approving and following that case.

Upon the authority of these last-named cases, the judgment in this case will have to be affirmed.

The judgment is affirmed, with costs.

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WILLIAMS V. STATE.

(64 Ind. 553.)

Criminal law — indictment — "public place" — highway.

The words "on a public highway," in an indictment, are not equivalent to the words "public place" in a statute against notorious lewdness. (*See note, p. 188.*)

CONVICTION of notorious lewdness. The opinion states the facts.

H. A. Yeager, for appellant.

T. W. Woollen, Attorney-General, and *W. H. Trippet*, prosecuting attorney, for the State.

BIDDLE, J. The appellant was indicted for notorious lewdness, in the following words:

"The grand jurors of Gibson county, in the State of Indiana, good and lawful men, duly and legally empaneled, sworn and charged, in the Gibson Circuit Court of said State, at the August term for the year 1878, to inquire into felonies and certain misdemeanors in and for the body of said county, in the name and by the authority of the State of Indiana, on their oaths do present that Joseph L. Williams, late of said county, on the 15th day of June, A. D. 1878, at said county and State, was then and there unlawfully guilty of notorious lewdness, by then and there unlawfully, on a public highway in said county, openly, grossly and notoriously having sexual intercourse with one Cordelia Mistle, a woman. That the said Joseph L. Williams, at the time and place aforesaid, had the sexual intercourse aforesaid with the said Cordelia Mistle, in the presence of Scott Harvey and William Lindsey, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana."

The appellant moved to quash the indictment. His motion was overruled and he excepted; plea, not guilty; trial and conviction; punishment, fine sixty-five dollars and imprisonment three months.

By a motion for a new trial the appellant also questions the sufficiency of the evidence to sustain the verdict.

The section of the statute upon which the indictment is based reads as follows, and is found in 2 R. S., 1876, p. 446:

“Sec. 22. Every person who shall be guilty of notorious lewdness, or who shall, in any public place, make any uncovered and indecent exposure of his or their person, upon conviction thereof, shall be fined in any sum not less than ten nor more than one hundred dollars, to which may be added imprisonment for any term not exceeding three months.”

The principal objection made to the indictment is, that the words “on a public highway,” used therein, are not equivalent to the words “in any public place,” as used in the statute.

Long experience has settled the best words to be used in a statute in defining a criminal offense, and it is seldom safe to depart from them in charging an offense in an indictment; yet it is settled law that when other words are used which are clearly equivalent, the indictment will not be insufficient for that reason. The question we are considering, therefore, is, are the words used in the indictment, in defining the offense, clearly the equivalent of those used in the statute?

The history of a country, its topography and condition, enter into the construction of the laws which are made to govern it, and we must notice these facts judicially. We must know the fact that in the State of Indiana, a public highway sometimes ceases to be traveled, and is abandoned, long before it ceases to be legally a public highway, and that often portions of a highway are not used as such for so long a time that they cease to be public places; and indeed, there are occasionally places, owing to their peculiar topography, on public highways constantly used, which become private, and afford even secret places, where the act charged upon the appellant might have been committed wholly away from public gaze or annoyance. Besides, sometimes public highways are laid out and established legally, through portions of primeval forest and thick underbrush, affording many secret places for “nest-hiding,” which remain secure and unbroken, and impenetrable to the public eye, for a long time before such highways are opened practically, and become public places.

The act, to make it criminal, whatever be its morality, must have been committed in some “public place;” and unless we can hold, as a safe rule of law to govern all cases, that the words “on a pub

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lie highway" are generally the equivalent of the words in a "public place," the indictment must be held insufficient.

The section defining an affray, in the same act, 2 R. S., 1876, p. 459, is as follows:

"Sec. 6. If two or more persons, by agreement, fight in any public place, the person so offending shall be deemed guilty of an affray; be fined not exceeding twenty dollars, or imprisoned not exceeding five days each."

It will be observed, that as to the place in which the act must be committed to make it criminal, the same words are used in defining an affray as those used in defining notorious lewdness. The same construction, then, should be given to the words in both cases.

In the case of *State v. Weekly*, 29 Ind. 206, which was a prosecution for an affray, it was held that the words "in a certain highway there situate," used in the indictment, were not equivalent to the words in a "public place," used in the statute; and the court, speaking through GREGORY, J., gives some excellent reasons for their opinion, as follows:

"An affray, like public indecency, is an offense exclusively against the public. The parties cannot complain because they have brought the evil upon themselves. The public is injured by the terror produced, and the evil example. The offense consists not in fighting by agreement, but in fighting by agreement in a 'public place.' There may be a legal highway not a public place, within the meaning of the statute. There may be, by the growth of timber or underbrush, a part of a highway perfectly concealed from public view, and as private as any place in the Commonwealth." See *Jennings v. State*, 16 Ind. 335; 4 Bl. Com. 65.

It is suggested that there is a difference between the words "in a certain highway," which were considered in the case cited, and the words "on a public highway," which we are now considering. We perceive no legal difference. Every highway is a public highway. In our statute the words are used as convertible terms. 2 R. S., 1876, p. 316. And there is no practical difference in the meaning of the prepositions *in* a highway and *on* a highway, and as they are used in the context in the two cases, they mean the same thing. Nor will the averment that the act was committed in the presence of Scott Harvey and William Lindsey aid the indictment. It might have been done in a very secret place, and yet be in the presence of two persons. We must hold the indictment insufficient.

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The judgment is reversed, the cause remanded, with instructions to sustain the motion to quash the indictment and release the appellant from imprisonment.

Petition for a rehearing overruled.

NOTE BY THE REPORTER. — There has been a good deal of discussion as to what constitutes a "public place" or a "public house," within the statutes against gaming, affrays and indecent exposure.

The English statute provides that "no house, office, room, or other place shall be opened, kept or used for betting purposes." In *Eastwood v. Miller*, L. R., 9 Q. B. 440; *S. C.*, 9 Eng. (Moak) 429, the appellant was the occupant of inclosed grounds, into which persons were admitted on payment of a fee, and where a pigeon-shooting match for ten pounds a side, and a foot-race took place, persons betting on the match and the race. Counsel contended that the grounds were not a "place," because not covered by a roof. But the court did not take that view. It might as well be said that the betters were not persons unless they had their hats on. A case was cited where one was convicted, under this statute, of keeping a gaming-table under a tree in Hyde Park. In *Bows v. Fenwick*, L. R., 9 C. P. 339; *S. C.*, 9 Eng. (Moak) 374, one was indicted, under the same statute, of standing at a race-course, on a stool, under an umbrella, seven or eight feet high, supported by a staff stuck into the ground, and kept up, rain or shine. The umbrella was marked: "G. Bows, Victoria Club, Leeds." A card was exhibited on which were the words: "We pay all bets first past the post." The defendant called out, offering and making bets, and giving tickets for the money. This umbrella was held to be a "place," and the court shut it up. One of the judges conceived that a prize-ring, or a wagon with an awning, would not be a "place," and conceived that the umbrella was, properly speaking, an open tent. In *Killman v. State*, 2 Tex. Ct. App. 222; *S. C.*, 28 Am. Rep. 432, it was held that a canvas tent may be a "disorderly house."

It was held in *Henderson v. State*, 59 Ala. 89, that an out-house in the bushes on the edge of a field, in the corporate limits of a town, about forty yards from a public road, and near and in a view of a path used by school children and other persons, is a "public place," within the meaning of the statute against gaming. So is a barn, 200 yards from a tavern, where many persons are assembled for mustering, and sixty or seventy yards from another barn where the tavern keeper is selling spirits. *Farmer v. Commonwealth*, 8 Leigh, 741. So is a steamboat carrying passengers and freight. *Coleman v. State*, 13 Ala. 602. So is an infirmary. *Flake v. State*, 19 id. 551. So is a shoemaker's shop into which many passed, although a few were excluded during the gaming. *Campbell v. State*, 17 Ala. 369. And so is an old house formerly used as a jail, on a public square and open to all, and occasionally used by the guards of the new jail. *Walker v. Commonwealth*, 2 Va. Cas. 515. A bed-room kept locked so that none can enter but by permission, is a public place if accessible to all, by night and day, who wish to indulge in gaming. *Smith v. State*, 52 Ala. 384.

The house of a keeper of a toll-bridge, consisting of two rooms, in one of which is the office for the transaction of the business of the bridge and where persons were privileged to go to settle for tolls, is a public house. *Arnold v. State*, 29 Ala. 46. So is the office of a justice of the peace. *Burnett v. State*, 30 Ala. 19. So where a house has but two rooms, front and back, the front used as a magistrate's office, the back by partners of a dissolved firm for settling their accounts, with an opening between, the back room is a public place. *Id.* 19. So the back room of a country store, used as a bed room by one of the proprietors who is unmarried. *Huffman v. State*, 30 Ala. 532. So of a room back of a broker's office, used and occupied in like manner. *Wilson v. State*, 31 Ala. 371. So of a barber's shop on the first story, the gaming being carried on in a room in the second story, accessible only by an exterior flight of stairs, and used by the barber in daguerrean experiments or as a depository for broken apparatus and chemicals. *Moore v. State*, 30 Ala. 550. And so of a saddler's shop including a back room situated and accessible in like manner. *Bentley v. State*, 32 Ala. 596.

A privy belonging to a country school-house, is not, during vacation, a public place within the statute of gaming. *McDaniel v. State*, 35 Ala. 390. Nor is a spot, surrounded with brush and briars, 200 yards from where a public shooting match is going on. *Com. v. Vandine*, 6 Gratt.

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688. Nor a room in an out-house within a tavern enclosure, formerly used in connection with the tavern, and a room over which is still so used, but now used independently of the tavern by one who boards there. *Purcell v. Commonwealth*, 14 Gratt. 679. Nor a hollow 100 yards from a dram shop, not visible therefrom nor from a public road, and not customarily used for gaming. *Smith v. State*, 23 Ala. 39; *Bythword v. State*, 20 Ala. 47. Nor is a private house, to which the public are not permitted to go without invitation, made a public place by the presence of eight or ten invited persons. *Coleman v. State*, 20 Ala. 51. Nor the office of an unmarried physician, where he eats and sleeps, the gaming being at night with closed doors and a few invited friends. *Clarks v. State*, 12 Ala. 493. Nor a lawyer's office, occupied and used in like manner, although during the session of court. *Burdine v. State*, 25 Ala. 60. Nor the office of a married physician, adjoining a merchant's counting-room, and occupied at night by another as a sleeping-room, who frequently held invited card parties there. *Sherwood v. State*, 25 Ala. 78. Nor the back-room used by a register in chancery as a bed-room, adjoining and communicating with his office, the house having a high fence in the rear, and the persons invited coming in by the back way. *Roquemore v. State*, 19 Ala. 528. Nor a store-house in a village, late at night, after persons have ceased to come for goods, and the door is locked. *Commonwealth v. Feale*, 8 Gratt. 535; *Windsor v. Com.* 4 Leigh, 680. (But it is a "public house." *Skinner v. State*, 30 Ala. 564.) Nor is a room made a public place by the mere fact that it adjoins and communicates by an open door with another in which are persons who are not gaming. *State v. Lowrie*, 43 Tex. 602. A "room in a public court-house" is not necessarily a "public place." *Shihagan v. State*, 9 Tex. 430.

A public omnibus is a "public place" within a statute against indecent exposure of the person. *Reg. v. Holmes*, 3 Carr. & K. 360. In *Reg. v. Orchard*, 3 Cox C. C. 248, it was held that a urinal, with boxes or divisions, for the convenience of the public, situated in an open market, was not a public place within the same statute. But the contrary was held in *Queen v. Harris*, L. R., 1 C. C. 282. The court said: "It appears that the urinal was open to the public; that it was in Hyde Park, upon a public foot-path, and that the entrance to it was from that foot-path. I think it was just as much a public place, with respect to that portion of the public who use it, as a public highway. Every place must be more or less screened from view on some side, and the size of an enclosure does not necessarily affect the question whether it is a public place or not." Where one indecently exposed himself on the roof of a house in view from the back windows of several other houses, and was seen by seven persons from one of those windows, but could not be seen from the highway, *Ald*, that this was in a public place. *Reg. v. Thallman*, 1 Leigh & C. 336. The sea-beach, visible from inhabited houses, is a public place. *Reg. v. Orsden*, 2 Camp. 89. But an indictment charging indecent exposure "in a public place, to wit, a public road," is bad, the publicity having reference to the number of persons rather than the locality. *Moffit v. State*, 43 Tex. 346.

A field in a forest and one mile from a highway or any other public place, is not a public place, although three persons are present, two of whom engage in an affray. *Taylor v. State*, 22 Ala. 13. (So held in respect to an indecent exposure in a bar-room, only one other person being present. *Reg. v. Webb*, 1 Den. C. C. 338. So under the like circumstances in a church-yard. *Rez v. Watson*, 3 Cox C. C. 376.) But an enclosed lot, thirty yards from the street of a country town, but visible from the street, is a public place within the common-law definition of an affray. *Carnell v. State*, 35 Ala. 392. "The tumult could be heard and its exciting scenes witnessed; and persons passing by would be within reach of missiles thrown by the combatants," said the court.

For the purpose of posting notices, houses of public worship, inns, and perhaps in some places, retail shops, are public places. *Seammon v. Seammon*, 28 N. H. 428; *Tidd v. Smith* 3 Id. 121.

CASES
IN THE
SUPREME COURT
OF
IOWA.

IOWA LUMBER Co. v. FOSTER.

(49 Iowa, 25.)

Corporation — purchasing its own stock.

A corporation, with power to purchase "property deemed desirable in the transaction of its business," may purchase its own stock.

ACTION by a corporation for an accounting and for the surrender of notes. The defendant Foster alleged, by way of counter-claim, that he bought the plaintiff's stock, to a certain amount, upon the agreement that the plaintiff would purchase it from him on certain conditions which had subsequently been fulfilled. The defendant had judgment below.

Robinson & Lacey and H. B. Fouke, for appellant.

Pollock & Shields, for appellees.

SEEVERS, J. (Omitting a question of practice.)

It is assigned as error that the court erred in finding there was any valid contract to take back Foster's stock, and for rendering judgment for him for the amount found due for said stock. It will be observed that the first portion of this assignment is more in the nature of a complaint that the finding of facts in reference to the stock is not sustained by the testimony, than that there has been any

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erroneous ruling as to the law. It is the judgment rendered on the facts only we need discuss in view of the concessions of counsel before referred to.

The ultimate fact found by the court on this branch of the case is as follows: "On the counter-claim and cross-demand of said Foster against said company, for the claim of value of his 100 shares of stock upon the original agreement to take said stock of him and pay him back the value of said stock and its earnings, I can come to no other conclusion than that there was such an agreement." The court then proceeds to group together the evidence, or refers to the testimony on which he founds his conclusion, but this cannot be said to be any portion of the facts found, nor would it change the result unless we could look at the testimony and therefrom conclude differently. Taking it for granted that the finding of fact is sufficiently supported by the evidence the judgment is undoubtedly correct unless the contract or agreement was *ultra vires*, and to that question we turn our attention. In Green's Brice's *Ultra Vires*, 98, it is said in the text that "corporations cannot, whatever the nature of their business, without express and very clear power in that behalf, deal in their own shares." In a note by the American editor, on page 99, it is said: "American authorities hold that there is at common law nothing to prevent a corporation from taking its own stock in payment or satisfaction of debts; and some even hold that at common law a corporation may purchase its own stock, provided the transaction is *bona fide* and not in fraud of creditors." In support of this doctrine the following cases are cited: *Barton v. P., J. and U. F. Plank-road Co.*, 17 Barb. 397; *Cooper v. Frederick*, 9 Ala. 738; *Verplanck v. Mer. Ins. Co.*, 1 Edw. Ch. 84; *Hartridge v. Rockwell*, R. M. Charlton, 260; *Gillett v. Moody*, 3 Coms. 479; *Taylor v. Miami Exporting Co.*, 6 Ohio, 176; *State Bank v. Fox*, 3 Blatch. 431; *Bank of Columbus v. Bruce*, 17 N. Y. 507.

We do not deem it necessary to ascertain and determine what the true rule is when the charter accurately defines and limits the objects of the corporation, as the powers of the corporation in question, without serious doubt, we think, are sufficient to cover and include the act in question. In this State persons desiring to form a corporation do so under a general law and may assume such powers, and define and limit the extent thereof in such manner as is deemed advisable, provided such powers and privileges do not exceed those possessed by natural persons. Code, § 1058.

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The articles of incorporation provide as follows: "The general and principal business shall be the manufacture and dealing in lumber, lath, shingles and other articles as the company may from time to time direct. The company may acquire and transfer, purchase and hold, sell or exchange any real estate *or other property* that may be deemed desirable in the transaction of its business." It must be presumed the word "property" was understandingly used, and with reference to the meaning attached thereto in the statutes of this State. "Property" includes personal and real property, and "personal property" includes money, goods, chattels, evidences of debt, and things in action. Code, § 44, subdivisions 9 and 10.

The provisions of the charter in question are much broader and more comprehensive than those contained in the charter of the banking company, in reference to which the decision was made on which the doctrine in the text in Green's Brice's Ultra Vires is based, before referred to. Express power is given the plaintiff to buy or sell any and all kinds and species of property which may be deemed advisable and for the best interests of the corporation by the officers thereof.

Under this power a contract was made to purchase the defendant Foster's stock. There is no pretense of fraud or bad faith in the transaction; nor, so far as shown, are the rights of creditors injuriously affected. The only objection urged, is the want of power. That is to say, the contract was made in good faith, but the power to do so did not exist. This objection cannot be permitted to prevail. After assuming the powers above specified it does not lie in the mouth of these corporators to raise or insist on this objection.

[Omitting minor questions.]

As to this point the judgment was

Affirmed

State v. Dean.

STATE V. DEAN.

(49 Iowa, 73.)

Criminal law — larceny — lost goods.

One who finds lost goods which have no marks or indications of ownership, and who does not know the owner, is not bound to exercise diligence to ascertain the owner, and is not guilty of larceny in retaining the goods.*

CONVICTION of larceny. The opinion states the facts.

Pollock & Shields, for appellant.

J. F. McJunkin, Attorney-General, for the State.

ADAMS, J. The evidence shows that in July, 1876, a great flood occurred in the Catfish creek, at the village of Rockdale, in the county of Dubuque, whereby nearly the whole village was swept away and destroyed. Two stocks of merchandise were swept away and the goods swept to a great distance. A part of these goods, as well as articles of household furniture, etc., were gathered up by different persons immediately after the flood and carried to different houses in the neighborhood. The defendant found on the banks of the Catfish, about three-fourths of a mile below Rockdale, some papers belonging to one Horn, also a lady's muff, a piece of flannel, a piece of muslin and a coat, and took the same to his house. They were at the time very much soiled by wet and dirt, and his wife washed them and hung them out to dry on a clothes-line by the side of a public street, where they were found. The evidence shows that the defendant had previously been making inquiry as to where Horn could be found, with the ostensible purpose of restoring to him the papers. There was no evidence tending to show that the defendant knew who owned the other property, and as to a part of it the ownership does not seem to have been ascertained yet.

The defendant asked the court to give an instruction in these

* Compare *Griggs v. State* (58 Ala. 425), 20 Am. Rep. 762, and note, 768; *Stark v. State* (68 Ind. 185), 20 Am. Rep. 214.

words: "If you find from the evidence that said goods were lost; that the same were found by the defendant; that at the time he found the same he did not know who owned them; that there were no marks upon or about the goods showing to whom they belonged, so that defendant could identify the owner at once—even though the defendant could afterwards have discovered the owner by honest diligence—then you must acquit the defendant." The court refused to give this instruction, and instructed the jury as follows: "Lost goods may be the subject of larceny, and should receive the same protection from the civil and criminal law as goods in any other situation. Where the finder knows or has the immediate means of knowing who was the owner, and instead of returning the goods, converts them to his own use, such conversion will constitute larceny. Reasonable diligence in discovering the owner should be shown by the party finding. The intention of a party committing a larceny at first may not be felonious, but if the property is wrongfully used or converted, it is larceny." In giving these instructions and in refusing to instruct as asked, we think that the court erred. The statute upon the subject is in these words: "If any person come by finding to the possession of any personal property of which he knows the owner, and unlawfully appropriates the same or any part thereof to his own use, he is guilty of larceny." Section 3907 of the Code. The crime if committed, must consist in the original taking. It cannot consist in a subsequent lack of diligence in attempting to find the owner, nor in a subsequent conversion. The statute does indeed provide a penalty for converting lost goods. It provides a penalty of twenty dollars. In addition, the owner may recover for any damage which he may sustain. Code, § 1522. The statute also provides what steps the finder of lost goods should take, and how he may be compensated. Code, §§ 1514, 1515, 1516 and 1518. But where the original taking is lawful, as where the finder is ignorant of the owner, the omission to take the steps pointed out by the statute, and the conversion, do not constitute larceny. This is not only the plain meaning of the statute, but it is the doctrine of the decisions. It is stated in Bishop's Criminal Law, vol. 2, § 882, 5th ed., in these words: "A man knowing the owner of goods cannot lawfully pick them up without returning them to him, but a man not knowing the owner can. The doctrine, therefore, is that if when one takes goods into his hands he sees about them any marks, or otherwise learns any facts by which he knows who the owner is, yet

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with felonious intent appropriates them to his own use, he is guilty of larceny; otherwise not."

In *People v. Cogdell*, 1 Hill, 94, the defendant was indicted for larceny of a lost pocket-book, and money contained therein. He made no effort to find the owner, and converted the property to his own use. The court held that it was a mere case of trover, and not larceny. The same doctrine is held in *People v. Anderson*, 14 John. 294; *S. C.*, 7 Am. Dec. 462; *State v. Conway*, 18 Mo. 321; *Wright v. State*, 5 Yerg. 154. The rule that the use of property by the finder, without reasonable diligence upon his part to find the owner, would constitute larceny, would often be oppressive. Scarcely any effort, short of a successful one, might be deemed by juries sufficient. In the meantime, the finder must care for the property, and if, through his negligence it is lost, he becomes liable to the owner.

The rule here held is in harmony with that held by this court in *State v. Wood*, 46 Iowa, 116, in which substantially the same principle was involved. In that case the defendant had innocently come into the possession of a guitar, and afterward sold it, with the design of appropriating the proceeds; it was held not to be larceny. The same doctrine was held in *Abrams v. The People*, 6 Hun, 491, and *Wilson v. The People*, 39 N. Y. 459.

Reversed.

CITY OF BURLINGTON v. BURLINGTON STREET RAILWAY CO.

(40 Iowa, 144.)

Municipal corporation—license for street railway—estoppel.

A municipal corporation granted permission, by ordinance, to a street railway company to lay a double track in its streets. The company proceeded to do so, and expended large sums of money in the work. *Held*, that the municipal corporation could not thereafter restrict the permission to a single track, it not appearing that the double track would cause any injury or inconvenience.

ACTION to restrain the laying of a street railway track. The opinion states the case. The defendant had judgment below.

J. & S. K. Tracy, for appellant.

Blake & Hammack, for appellee.

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BECK, J. I. The petition in this case was filed December 3, 1877. It shows that an ordinance of the city was adopted July 7, 1873, conferring upon defendant authority to construct a street railway. The provisions of this ordinance need not be set out further than to present the following sections upon which the questions involved in this case arise:

“Section 5. Authority is hereby conferred to lay single or double tracks on said streets, except that on streets not more than forty feet wide only one track shall be laid, together with such turnouts, side-tracks, switches and turn-tables as may be deemed necessary by said company.

“Sec. 10. The city reserves the right, by proper police rules and regulations, to govern and control the movement of cars, their speed, places of stoppage and all other matters and things within the purview of the proper and good government of said city, and which tend to promote the safety and comfort of the passengers and citizens of said city.”

In pursuance of this ordinance the defendant built a street railway with a single track and is operating the same. On the 29th day of October, 1877, the city council repealed section 5 of the ordinance and in lieu thereof enacted the following substitute:

“Authority is hereby conferred to lay single tracks on said streets, together with such turnouts, switches and turn-tables as may be deemed necessary by said company, *provided* that in no case shall double tracks be laid upon any of said streets unless future authority is conferred by an ordinance of said city.”

It is further shown, that in disobedience of the ordinance as it now stands since the amendment, the defendant is about to lay a double track upon Division street, between Fifth and Eighth streets. It is alleged that Division street is a principal thoroughfare of the city and has been improved by grading, curbing and macadamizing since the construction of the defendant's single track thereon. The street is forty-two feet wide between the gutters, and the grade thereof is high making an ascent of seven feet in 100. The double track will occupy eighteen feet of the width of the street.

It is alleged that the defendant uses the T rail and proposes to lay it down in constructing the double track, and that the rail “is greatly objectionable on account of its peculiar shape.”

It is charged that, under the ordinance as amended, defendant has no right to lay down the double track, and plaintiff claims that the

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amended ordinance was adopted under lawful authority of the city.

The petition states that, prior to the amendment of the ordinance, defendant had purchased the iron and material for the double track but no part thereof had been laid.

The answer of defendant shows that it has expended a large sum of money in building and operating its street railway; that the double track as proposed to be constructed is necessary for the convenience, speed and safety of the traveling public. Defendant claims that under the ordinance as it originally stood, it had the right to build the double track, and that right cannot be taken away by amendment or change of the ordinance. A demurrer to the answer was overruled.

It will be observed that it is not alleged the proposed double track will interfere with the proper use of the street by the public, or will injure the property of any citizen. Its construction is attempted to be enjoined solely on the ground that the amended ordinance withholds from defendant authority therefor.

[Omitting an unimportant point.]

III. The ordinance, as adopted, gave the defendant authority to lay the double track in controversy in this case. Under this ordinance the defendant expended large sums in the construction of its railway. The ordinance constitutes a contract whereby defendant is secured in the exercise of the powers conferred therein. If it had not this effect, defendant would have no security that its property would not be destroyed by unfriendly legislation by the city council. The law will secure to defendant the exercise of all the powers conferred by the ordinance. The city cannot, without the consent of the defendant, change the terms of the contract entered into by the ordinance, nor abrogate or nullify it. The amendment, therefore, which attempts to take from defendant the right to lay a double track cannot have the effect intended, and will deprive defendant of no right guaranteed by the original ordinance.

IV. It is urged that the city, in the discharge of its police power, may forbid the laying of the double track. The question presented by this position is not in this case, for the reason that it is not shown in the pleadings that the proposed double track would operate to the inconvenience of the public, or would work injury to the city, or any of the people. It is not claimed that the proposed improvement would be a nuisance, nor is it shown that the best interest of

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the city or the people requires it to be forbidden. If therefore the city retains, in the exercise of its police authority, the power to forbid the construction of the double track, the facts present no case for the exercise of that power. It cannot be claimed, surely, that the city, in the exercise of its police power, could deprive the defendant of the right granted by the original ordinance, when the exercise of that right wrought injury to no one. This police authority is not a despotic power that may be exercised without a sufficient public purpose.

The judgment of the Circuit Court is

Affirmed.

STATE V. FITZGERALD.

(49 Iowa. 260.)

Criminal law — attempt to commit abortion — intent.

A statute provided for the punishment of any one who willfully administered any drug or substance whatever, with intent to produce the miscarriage of any pregnant woman. *Held*, that it was not essential to guilt that the woman should be quick with child, nor was it a defense that a harmless substance was administered, provided the guilty intent existed.

(See note p. 149.)

CONVICTION of attempt to produce abortion. The opinion states the case.

John F. Lacey, for appellant.

J. F. McJunkin, Attorney-General, for the State.

ROTHROCK, Ch. J. (Omitting a minor question.)

Section 3864 of the Code provides: "If any person, with intent to produce a miscarriage of any pregnant woman, willfully administer any drug or substance whatever, or with such intent use any instrument or other means whatever, unless such miscarriage shall be necessary to save life, he shall be imprisoned, etc."

The defendant asked the court to instruct the jury that the crime could not be committed upon a woman who was not quick with child. The instruction was, we think, correctly refused. The statute makes no such qualification. The crime consists in attempting

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to produce the miscarriage of any pregnant woman. The crime is complete if the attempt be made at any time during pregnancy.

The evidence tended to show that the substance used in the attempt to produce the miscarriage was tobacco, and that the instrument used was a syringe. The medical witnesses testified that tobacco was not such a substance as would produce the result intended. The court refused to instruct the jury that the defendant could not be convicted unless the substance administered was such as would produce a miscarriage.

In this, we think, there was no error. The statute provides that the administering of "*any substance*," with the criminal intent, shall constitute the crime. A party who, with the necessary criminal intent, uses any substance to produce a miscarriage, surely cannot be held innocent because he mistakenly administered a drug or substance which did not produce the result intended. It is the intent, and not the "*substance*" used, that determines the criminality. The name of the drug or substance need not be given in the indictment. *State v. Vawter*, 7 Black. 592; *Shortwell v. State*, 37 Mo. 359; *Com. v. Munson*, 16 Gray, 224.

But on another point

Judgment reversed.

NOTE BY THE REPORTER. — In *Mitchell v. Commonwealth*, Kentucky Court of Appeals, November, 1879, it was held that to procure an abortion before quickening is not a crime at common law. The court says: "In the interest of good morals, and for the preservation of society, the law should punish abortion and miscarriages, willfully produced, at any time during the period of gestation. That the child shall be considered in existence from the moment of conception for the protection of its rights of property, and yet not in existence until four or five months after the inception of its being, to the extent that it is a crime to destroy it, presents an anomaly in the law that ought to be provided against by the law-making department of the government. The limit of our duty is to determine what the law is, and not to enact or declare it as it should be. In the discharge of this duty, and after a patient investigation, we are forced to the conclusion that it never was a punishable offense at common law to produce, with the consent of the mother, an abortion prior to the time when the mother became quick with child. It was not even murder at common law to take the life of the child at any period of gestation, even in the very act of delivery. The indictment in this case does not allege that the woman was quick with child; it does not allege that the potion was administered with the intention to destroy the life of the child, nor that such was the result produced by it." The same view was taken in *Commonwealth v. Parker*, 9 Metc. 263; *State v. Cooper*, 2 Zab. 53; *Smith v. State*, 33 Me. 48. *Contra: Mills v. Commonwealth*, 13 Penn. St. 633.

As to commission of an offense without intending it, see *Stern v. State* (53 Ga. 229), 21 Am. Rep. 266, and note 268, and *Dudley v. Sanbina*, *post*.

As to intent to commit a crime, without succeeding, see *Hamilton v. State* (36 Ind. 280), 10 Am. Rep. 22; *Mullen v. State* (45 Ala. 43), 6 Am. Rep. 691.

In *State v. Martin*, 31 La. Ann. 849, it was held that on the trial of an accused for carrying a pistol concealed on his person, evidence to show that the pistol belonged to another, that the owner placed it in the hands of the accused merely to get cartridges for it, and that the accused owned no pistol, and had never been known to carry one, is not admissible. The court said: "To constitute the crime charged, it suffices that a dangerous weapon be carried concealed on or about the person, and it matters not that it be so carried with or without any actual intent.

Livingston v. Moingona Coal Co.

LIVINGSTON v. MOINGONA COAL CO.

(49 Iowa, 369.)

Negligence — removing minerals — injury to owner of surface soil

One who conveys land to another reserving the right to remove the underlying coal is bound to exercise ordinary care in the removal, and if necessary, to leave pillars or ribs of coal to support the surface of the soil, although the reservation exempted him from any liability for injury to the surface of the land by reason of the mining operations.*

ACTION of damages for injury to land by mining for coal. The opinion states the case. The plaintiff had judgment below.

I. N. Kidder, for appellant.

Hull & Ramsey and *Barcroft*, *Given & Drabelle*, for appellee.

BECK, J. I. One count of the petition charges that defendant negligently removed the coal from the mines under plaintiff's premises without making or leaving sufficient supports to uphold the earth above the coal, and by reason of such want of care the surface was broken up and defendant's house was injured. Other counts charge that defendant, without authority, removed the coal lying under the surface of the premises of plaintiff and of the streets adjacent thereto.

The answer alleges that the plaintiff is not the absolute owner of the premises, but that his ownership is derived through a deed wherein the right to mine coal and to remove it is reserved in defendant, and quoting the language of the answer, "that the mining and removing said coal was done in the most careful and in the best manner, and in a way to cause the least injury to the property of plaintiff and the surface of said premises. That any injury, if any, to said property was altogether unavoidable and could not have been foreseen or provided against by this defendant, and that this defendant used great care, in and about all it did, in the removal and mining of said coal. And defendant further says that in accept-

* See *Coleman v. Chadwick* (80 Penn. St. 81), 21 Am. Rep. 93.

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ing said deed said plaintiff expressly released and held this defendant harmless for the pretended injuries and matters for which he claims damages in his petition."

II. The only question discussed in the argument of defendant's counsel involves the correctness of the instructions given by the court below to the jury which relate to the obligation resting upon defendant to exercise care in mining the coal.

The deed from defendant under which plaintiff claims title to the premises contains a reservation of the right to mine coal in the following language: "And reserving, also, to said first party, his heirs, successors and assigns all coal, coal mines, mineral products and oil beneath the surface of and belonging to said premises with full and sole right to mine and obtain and remove the same by such means as they deem proper without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of the land in working coal, coal mines, minerals, mineral products and oil, and removing the same provided the said first party shall not enter on the surface of said lands."

The court, in two instructions, directed the jury that defendant, by virtue of the reservation in the deed, has the right to remove the coal provided it be not negligently done, and that to entitle plaintiff to recover he must show that the mining was negligently done and that plaintiff sustained injury thereby. No objections are made to these instructions. The following instruction upon the subject of the care to be used by defendant was given the jury:

"10. Further, if you find that ordinary care and prudence would have required the leaving of pillars or ribs of coal when only artificial supports were substituted, or if the supports were left or placed further apart than was reasonably necessary to support the plaintiff's premises, keeping in view the question of ordinary care in so doing, it was negligence in the defendant in not leaving such pillars or ribs, or in not substituting more artificial supports in place of the coal removed; and if the plaintiff's premises were injured by reason of such failure he may recover therefor."

It is not claimed that this instruction was not applicable to the evidence, but defendant insists it presents incorrect rules of law. Other instructions were excepted to, but are not discussed in the argument of counsel. We are not called upon to consider them.

III. Counsel for defendant relies in argument upon objection to the instruction just quoted, based upon the ground that under it

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defendant has not the right to remove all the coal. The rule of this instruction so far as it is applied to the subject of "pillars or ribs of coal" to support the surface, is this: If ordinary prudence required such pillars, defendant was negligent in not leaving them.

The rule presented in other instructions, which defendant's counsel himself pronounces correct, is that defendant is liable for injury sustained by plaintiff from the negligence of defendant in removing the coal; that defendant was bound in working the mine to the exercise of ordinary care. There is no dispute as to the correctness of this rule. The instruction above quoted, which is assailed by defendant, directs the jury that if they find ordinary care required pillars of coal, defendant is liable if they were not left in mining. What constituted ordinary care was thus properly left to the jury, under the issues in the case, the plaintiff charging negligence on the part of defendant, while it alleged the exercise of due care.

An instruction given to the jury announced the rule, which is not doubted by defendant, that "plaintiff had the right to occupy the surface of the land, and the defendant to mine the coal, each using his property so as not unreasonably to interfere with the other's right." If, for the reason that pillars were not left, but all the coal was removed, it should be found that plaintiff's property was destroyed, it would follow that the failure to leave pillars would amount to an interference with plaintiff's rights for which defendant would be liable. It follows, therefore, that defendant can remove no more coal than is reasonably consistent with the preservation of plaintiff's rights. If the surface of the land may be preserved by substituting artificial supports, of course the coal may all be removed.

V. Counsel for defendant relies upon *Rowbotham v. Wilson*, 8 H. L. Cas. 348; *S. C.* 6 Ell. and Black. 593; and *Aspden v. Seddon*, 10 L. R. Ch. App. 394; *S. C.* 12 Eng. Rep. [Moak's Notes], 773, to support the position that defendant has the right to remove all the coal and cannot be held liable for negligence in not leaving pillars for the support of the surface. We think these cases have not the force claimed for them. In neither of them was any question raised as to the care to be used by the miners. In the first case it is held that the mine could be worked, though the surface was thereby rendered "uneven and less commodious to the occupiers." It does not appear that the surface could have been protected by any manner of mining.

The last case was brought to restrain defendants from working a mine, on the ground that plaintiff's buildings were in danger of

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destruction therefrom. It was held that the owner of the mine had the right, under the terms of the grant of land to the plaintiff, to take all the coal, upon paying compensation to the surface owner for any damage he thereby sustained. The restraining order was refused on this ground.

We discover no grounds for disturbing the judgment of the court below. It is, therefore,

Affirmed.

FIRST NATIONAL BANK OF CEDAR RAPIDS V. HENDRIE.

(49 Iowa, 402.)

Contract—public policy—to induce building of railroad.

A contract to pay money, in consideration that a railway company will construct its road to a certain point, is valid.

ACTION on promissory notes. The opinion states the case. The plaintiff had judgment.

Clinton, Hart & Brewer, for appellants.

C. R. Scott, for appellee.

BECK, J. I. The promissory notes which are the foundation of these actions were given to secure the building of the Cedar Rapids and Missouri River Railroad to Council Bluffs, which constituted the only consideration for which the notes were given. The answers set up the circumstances under which the notes were given, and upon these facts defendants claim the contracts are in conflict with public policy, and therefore void. It was shown, on the trial, that the railroad had been located so that it would reach the Missouri river at a point many miles north of Council Bluffs. The officers of the corporation building it informed the citizens of Council Bluffs that if sufficient inducements, in the way of contributions to the company, should be made by the people of Council Bluffs, the route of the road would be so changed that it would strike the Missouri river at their city. This proposition was accepted, and the notes in suit were given to secure the payment of contributions of defendants to make up the sum agreed to be paid the railroad company for building the road to Council Bluffs. Upon these facts defendants insisted,

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in the court below, that the notes were given under a contract in conflict with public policy, and are therefore void. The court held differently in an instruction to the jury. This ruling is now made the ground of objection to the judgment of the court below. No other question is presented in argument for our consideration.

II. Counsel for defendants insist that corporations organized for building and operating railroads are public in their character, and are charged with duties which require them to construct and operate their roads so as best to serve the interests of the public. In the application of the principle it is insisted that railroads ought to be located in view of the public interest, and that their location should not be changed to promote the interest of the corporations or their officers. If we admit these propositions to be sound, we are not prepared to concede that this case is brought within the rules advocated by counsel. It is not made to appear that the public interest did not demand the construction of the road to Council Bluffs, and that its first location to another point on the Missouri river was in conflict with public policy, and the change of location was therefore required by the duty and obligation of the corporation as understood by counsel. Whatever may have been the motive of the corporation in making the change of location, it surely appears to have been in accord with the public interest. We may judicially take notice of the location, history and population of the city of Council Bluffs, and also of the fact that the terminus of the road at the Missouri river, first proposed, was at a point of very inconsiderable importance. The interest of the public would be better served by the road terminating at the largest town upon the Missouri river within the borders of the State, rather than at a point where no town or city was built. The connection which the road would have at Council Bluffs with other railroads was also a matter of public concern, and should have influenced the choice of that city as a terminal point. It follows that the construction of the road to Council Bluffs was not in conflict with public policy.

But counsel contend that the payment of money by the parties interested to secure the location of the road as demanded by the public interest is in conflict with public policy; in other words, that the corporation cannot receive money as a gratuity for the construction of its railroad to Council Bluffs.

But this court has sustained statutes authorizing taxes in aid of railroad corporations to be voted by the people, on condition that

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their roads were built through the town or township where the vote was had. See *Stewart v. Supervisors of Polk County*, 30 Iowa, 9, and decisions following that case. Notes and contracts conditioned for the payment of money upon the completion of railroads to points indicated have been held to be supported by sufficient consideration. *Des Moines Valley R. Co. v. Graff*, 27 Iowa, 99; *First Nat. Bank Cedar Rapids v. Hurford*, 29 id. 579.

We conclude that under the decisions of this court, the contracts upon which the notes in suit were given are not in conflict with public policy.

Of the cases cited by counsel for defendants, we esteem *Holliday v. Patterson*, 5 Or. 177, to be alone in point. It is in conflict with the decisions of this court above cited. The other cases, *Pacific R. Co. v. Suley*, 45 Mo. 212; *Fuller v. Dane*, 18 Pick. 472; *St. Joseph, etc., R. Co. v. Ryan*, 11 Kans. 602; *S. C.*, 15 Am. Rep. 357; * *Butternut and Oxford Turnpike Co. v. North*, 1 Ill. 518; *Fort Edward and Fort Miller Plank Road Co. v. Payne*, 15 N. Y. 583, are upon peculiar facts, or based upon statutes which distinguish them from the case before us.

Affirmed.

 STATE V. PRIZER.

(49 Iowa, 531.)

Criminal law — seduction — “previous chaste character.”

A statute provided for the punishing of the seduction of any unmarried woman “of previously chaste character.” *Held*, that “character” referred to moral qualities and not to reputation, and evidence of reputation was not admissible upon the issue of character, but only to impeach or corroborate testimony regarding particular acts of unchastity.

CONVICTION of seduction. The opinion states the case.

A. H. Patterson & Son and *R. S. Mills*, for appellant.

J. F. McJunkin, Attorney-General, for the State.

* In that case, and in *Marsh v. Fairburg and Northern R. R. Co.* (64 Ill. 414), 16 Am. Rep. 584, it was held that a grant of a right of way in consideration that the company would build a station on those lands, and on no other within a certain distance, was on an illegal consideration.—[REP.]

BECK, J. The objections urged against the proceedings and judgment in this case will be considered in the order of their discussion pursued by the counsel for the defendant.

I. Two witnesses for the defendant were asked by his counsel to testify—the one as to the woman's moral character, the other in regard to her character for chastity. It is obvious, upon a consideration of all the language of the questions, as well as of the sense of the word in its colloquial use, that the term *character*, as used, expresses the idea conveyed by the word *reputation*. There can be no doubt that the exact thought of the questions related to the reputation of the woman for good morals and chastity, and that it was so understood by the court and counsel. Another witness for defendant was interrogated as to the woman's reputation generally. The questions were propounded in the examinations in chief, and the court upon objections by the district attorney, refused to permit the witnesses to make answer thereto.

The statute under which defendant was convicted, prescribes punishment for seducing and debauching “any unmarried woman of previously chaste character.” The word *character*, as here used, refers not to her *reputation*, but to her real moral qualities. The language of a prior decision of this court aptly expresses the true meaning of the word, viz.: “We think the statute intended to use the term ‘character’ in its accurate sense, and as signifying that which the person really is, in distinction from that which she may be reported to be.” *Andre v. State*, 5 Iowa, 389 (394).

The crime of seduction is committed when a really chaste woman is induced, by means which may overcome the virtuous, to submit to the embraces of her tempter. To determine whether the crime has been committed, the true character of the woman must be ascertained; it must be known whether she be really chaste or otherwise. The reputation of a man or woman does not always accord with the true character of the individual. The good and pure are often traduced by bad men and women, and suffer in reputation by reports invented and circulated through motives having their origin in enmity, malevolence and hate. The reputation of women for chastity is especially exposed to such assaults. A scandal having its origin in falsehood or imagination, has no limit to its circulation, and the unfortunate subject of the slander will usually hear no voice from her own sex lifted up in her defense. A direct and confidently asserted charge of impurity is usually accepted by womankind as

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evidence of want of virtue, and often the poor suffering victim of slander is driven from society by the good and pure of her own sex without evidence of her guilt. This sad truth is familiar to all. It is strange, indeed, that the heart of woman, so tender toward the afflicted, so full of charity, so forgiving, and always prompting to deeds of kindness, should be closed to the victims of slander among her own sex. It may be that the inexorable laws of society, which banish the slandered woman, tend to protect and preserve virtue by presenting the most powerful motives for its practice, while they often inflict the most cruel injustice. The law, however, can recognize no such rules. It will aim in each case, to administer justice, and will protect virtue against the assaults of the slanderer, though the victim be a woman. It will not permit the lewd and vicious, by falsehoods, to destroy the reputation of a woman and then to seek protection against the penalties it provides for the overthrow of her virtue under the slanders their malevolence created. But this result would be reached should the rule advocated by defendant's counsel be followed in cases of this kind. It cannot be recognized by the courts.

Counsel for defendant rely upon *State v. Shean*, 32 Iowa, 88, to support their position in this branch of the case. We there held that upon the trial of an indictment for seduction, where acts of lewdness had been testified to by witnesses for the prisoner, the good reputation of the prosecutrix for virtue may be shown in rebuttal. The decision is based upon the ground that a reputation for virtue, gained by a life of purity, renders, in a degree, charges of lewdness of sexual indulgence improbable, and may therefore be given in rebuttal of evidence supporting such charges. Evidence of a reputation for chastity, based upon a life of purity, surely ought to be a protection of some degree of strength against specific charges of lewdness; but it cannot be said that reputation for anchastity establishes the character to be impure. Such a character may be established by proof of particular acts, or by a course of life and conduct inconsistent with purity. A pure character may not be shown by reputation, but evidence of particular lewd conduct may be rebutted by proof of a good reputation. It will be observed that in no case can reputation be given in evidence to establish the chastity or the impurity of the woman. A good reputation being shown by the prosecutrix in rebuttal of specific charges of lewdness, the State of course, may introduce evidence upon that issue, and assail the

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woman's reputation in contradiction of the evidence she has offered upon that point. It will thus be seen that evidence of reputation is not admissible upon the issue involving the woman's character, but only to discredit or support testimony tending to establish particular acts of lewdness. See *Kenyon v. People*, 26 N. Y. 203; *People v Kenyon*, 5 Park. 286; *Bakemon v. Rose*, 18 Wend. 146.

The position of defendant's counsel upon this point is supported by 2 Wharton's Criminal Law (7th ed.), § 2672. The learned author cites, in support of the doctrine of the text, *State v. Shean, supra*. The citation of this case is clearly made under a misapprehension of the point decided, which we have endeavored to correctly state in the foregoing discussion.

[Omitting minor points.]

Affirmed.

HODGES V. KIMBALL.

(49 Iowa, 577.)

Sale — delivery — to carrier — effect of, as against creditors of vendor.

Grain was placed on railway cars, directed to the consignee, under an agreement that he was to sell it and apply the proceeds to repay indebtedness of the consignor for previous advances. *Held*, that the consignee acquired no lien as against a creditor of the consignor, attaching the grain before the shipping receipts were forwarded.*

REPLEVIN. The action was tried before a referee, who reported as follows:

"1. That in the spring of 1875 the plaintiffs and W. H. Vallean, at Milwaukee, in the State of Wisconsin, entered into a contract whereby the plaintiffs were to advance money to said Vallean on his drafts, drawn on them to purchase wheat and other produce to be shipped by him consigned to them at Milwaukee, to be by them sold on the usual commissions, and out of the net proceeds thereof to reimburse themselves for the advances so made; that said Vallean was to forward the railway shipping receipts to plaintiffs as soon as consignments were made.

* To same effect, as to statute or frauds, *Johnson v. Outtle* (105 Mass. 447), 7 Am. Rep. 545.

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"2. I find that pursuant to said agreement the plaintiff had advanced to said Vallean, up to the 10th day of May, 1876, \$18,173.13, in excess of all net proceeds of sales received by them.

"3. That in pursuance of said agreement all the wheat and other produce shipped by said Vallean from Cresco to Milwaukee (and nearly all that was shipped by him) was, after the making of said agreement, in accordance therewith, consigned to the plaintiffs; and in pursuance thereof, on the forenoon of the 10th day of May, 1876, five car loads of wheat, of the value of \$1,350, in bulk, on board of cars Nos. 3550, 4178, 3612, 4582 and 4732, were by Vallean's agent at Cresco delivered to the Chicago, Milwaukee and St. Paul Railway Company for shipment to Milwaukee, and their receipts given therefor, consigned to the plaintiffs, which receipts are attached to deposition of L. F. Hodges as exhibits 'A,' 'B,' 'C,' 'D' and 'E.'

"4. That after the delivery of said five car loads of wheat and the taking of the receipts therefor, and between one and two o'clock P. M. of the same day, the said wheat was attached by the sheriff of Howard county, at Cresco, as the property of W. H. Vallean, at the suit of the defendants Kimball & Farnsworth against him, and was afterwards retaken upon the writ of replevin in this action.

"5. The said Vallean kept an office at Decorah, and the usual course of his agent in charge at Cresco was to forward all shipping receipts to Vallean at Decorah, and they were forwarded from there to the plaintiffs. After this wheat was attached, Vallean's agent retained the receipts, and did not forward them to Decorah until three days after, when he was directed to do so by Vallean. On Monday, the fifteenth of May, they were forwarded to plaintiffs by mail, with the following letter:

"DECORAH, *May* 13, 1876.

"L. F. HODGES & Co.: Enclosed find receipts for the five cars attached at Cresco.

"W. H. VALLEAU, JR.'

— "And by due course of mail reached plaintiffs on the evening of May fifteenth.

"And as conclusion of law I find the plaintiffs entitled to the possession of the wheat by them replevied in this action, with the right to sell the same, and reimburse themselves from the proceeds for advances made to said Vallean, and recommend that judgment be entered accordingly."

The plaintiff had judgment below.

H. T. Reed, for appellants.

Thomas Updegraff, for appellees.

DAY, Ch. J. (Omitting a question of practice.)

III. The defendants offered to prove that no part of the wheat in question was bought by Vallean with money received by him from the plaintiffs. The plaintiffs objected to this offered testimony and stated that they would not claim that the grain in question was bought with money furnished by them. In our consideration of the case, therefore, we may regard the fact as established, though not reported by the referee, that the grain in question was not bought with moneys furnished by the plaintiffs, and we may give to this fact such weight as it may be entitled to.

IV. It is urged that the referee erred in refusing to permit defendants to prove that the grain in question was bought with funds advanced Vallean by defendants on Vallean's drafts drawn on plaintiffs, which drafts plaintiffs refused to pay. In this action there was no error. The mere fact that defendants furnished Vallean money and with it he bought the grain in question would give them no specific lien upon the grain. Their lien dated from the levying of the attachment.

V. The case must be determined upon the facts reported by the referee, with the additional fact that the grain was not bought with money furnished by the plaintiffs. From the facts reported it appears that the grain in question was shipped on the 10th day of May, 1876, from Cresco. On the same day the grain was attached at Cresco, at the suit of the defendants, as the property of W. H. Vallean. The shipping receipts were not forwarded to the plaintiffs until the thirteenth day of May, and did not reach them until the fifteenth. The advancements, on account of which the plaintiffs claim their lien, were all made before this grain was shipped. The facts of this case bring it upon all fours with *Elliott v. Bradley*, 23 Vt. 217, in which it was held that when goods are consigned to a factor under an agreement that he shall sell them and apply the proceeds to repay advances previously made by him to the consignor, he must, in order to acquire a valid lien upon the goods as against the creditors of the consignor, have the actual or constructive possession of the goods.

In this case an agreement was made between a manufacturer of

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cloth in the State of Vermont and the plaintiffs, who were commission merchants in New York, by which the manufacturer was to send his cloth to the plaintiffs for sale on commission, and was to draw upon them in advance of the sales, and also, in advance of sending the cloth, if necessary, upon sending the invoices of the cloth forwarded, or to be forwarded, and the plaintiffs were to apply the avails of the sales to repay their advances. Under this arrangement the consignor forwarded to the plaintiffs, from time to time, invoices of the cloth sent, and to be sent, and the cloth was then sent to forwarding merchants at Burlington, and was by them sent to the plaintiffs as soon as convenient. The drafts were drawn and the acceptances charged and sales credited upon general account. No bill of lading was sent to the plaintiffs but shipping bills were sent by the forwarding merchants to their agents in New York describing the consignor, the consignees and the marks upon the goods in order to guide the agents in delivering the goods to the consignees. It was held that the goods after being sent to the forwarding merchants, and while upon the transit between Burlington and New York, remained at the risk and subject to the control of the consignors and liable to attachment by their creditors. In fact this case is a stronger one in favor of the consignees than the one at bar for the cloth was in transit and the shipping lists had been sent to the agents of the forwarding merchants, while in the case at bar the wheat had not moved from the place where it was shipped and the shipping receipts still remained in the hands of the consignor. Appellee claims, however, that this case is overruled by the subsequent case of *Davis v. Bradley*, 28 Vt. 118. It is so stated in Bigelow's Overruled Cases, page 168.

The court announcing the latter opinion do not attempt to disturb the authority of the former but distinguish the latter case therefrom. The court, through REDFIELD, Ch. J., say: "In the case of *Elliott & Boynton v. Bradley*, 23 Vt. 217, there was no advance or acceptance upon the faith of any particular consignment, and nothing like a symbolical delivery which leaves the case wholly distinguishable from the present. No shipping list or receipt was ever delivered to the plaintiffs in that case by any one." In this latter case (28 Vt. 118) B. & H. Boynton delivered to the defendants, who were storage and commission merchants, several sacks of wool, for which the defendants gave receipts specifying that they were for the plaintiffs or to be forwarded to the plaintiffs. These receipts were sent to the

plaintiffs, and they, upon the credit of and with reference to said wool, accepted drafts drawn upon them by B. & H. Boynton. It was held that the plaintiffs thereby obtained the constructive possession of the wool and had a lien upon it for the amount of their acceptances. It was further held in this case that to give a factor a lien upon goods consigned to, but not actually received by him, the consignment must be to him in terms, and he must have made advances or acceptances upon the faith of the particular consignment. The distinction between *Davis v. Bradley*, 28 Vt. 118, and *Elliott & Boynton v. Bradley*, 23 Vt. 217, is apparent at a glance. In the former case the plaintiffs had received the shipping receipts, and made advances upon the faith of the particular consignment. In the latter case neither of these facts existed. The same distinction exists between *Davis v. Bradley & Co.* and the case at bar.

In *Bank of Rochester v. Jones*, 4 Coms., 497, it was held that where property is delivered to a forwarder or carrier, upon consignment to a factor for sale, but the receipt or bill of lading is not delivered or sent by the owner to the factor, and the property has not reached him, the factor acquires by the transaction no general or special property in the goods, notwithstanding the consignor may be indebted to the factor for advancements upon previous consignments to an amount greater than the value of the goods. See, also, *Winter v. Coit*, 3 Seld. 288; *Kimloch v. Craig*, 3 T. R. 119.

The appellees rely principally upon *Holbrook v. Wight*, 24 Wend. 169; *Grosvenor v. Phillips*, 2 Hill, 147; *Bailey v. Hudson River R. Co.*, 49 N. Y. 70; *Haille v. Smith*, 1 B. & P. 563; and *Krudler v. Ellison*, 47 N. Y. 36; *S. C.*, 4 Am. Rep. 402.

In *Holbrook v. Wight*, a consignment of goods was made, the consignor sending a letter of advice to the consignee, and immediately thereafter drawing upon the consignee for funds, who accepted the draft. From the circumstances it may well have been found that the acceptance was made upon the faith of the particular consignment. This would bring the case within the principle of *Davis v. Bradley*, 28 Vt. 118.

In *Grosvenor v. Phillips*, the consignor made a special agreement that the goods in question should be sent to plaintiffs for sale as a satisfaction for advances which plaintiff had made for him, and he placed them with a railroad agent for that purpose, transmitting an invoice and declaring his purpose by mail. These were controlling

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acts in the decision, the court holding that the transmission of the invoice and the declaration of the consignor's purpose were equivalent to the forwarding of a bill of lading.

In *Bailey v. Hudson River R. Co.*, 49 N. Y. 70, the acts were as follows: On the 13th of October, 1866, plaintiffs received in New York, from Alden, Frink & Western, of Cohoes, an invoice of three cases of goods, consigned to plaintiffs on account of consignors by the defendant's road. Plaintiffs advanced thereon three-fourths of their value, and at the same time loaned Alden, Frink & Western \$3,974.13, for which that firm gave their check, payable a few days ahead. The check not being paid, it was agreed that Alden, Frink & Western should ship to plaintiffs, to pay the debt, eight more cases of goods. Invoices were sent to plaintiffs, stating the goods were consigned to plaintiffs on account of the consignees. On the sixteenth and seventeenth of October, all the eleven cases were consigned to plaintiffs and delivered to defendant's agent at Troy, to be by defendant transported to plaintiffs at New York. Instead of delivering the goods to plaintiffs, defendant, without requiring the surrender of its receipts, allowed Mr. Frink, unknown to his firm, to change their destination, and in pursuance of his order, the goods were delivered to Albert Jewett & Co., of New York city, by whom they were sold, and the proceeds paid over to Frink. The firm of Alden, Frink & Western were at this time insolvent. Plaintiff demanded the goods of defendant's agent in New York. The court ordered a verdict for the plaintiff for the value of the goods. On appeal this judgment was affirmed. In this case the controlling facts are that the plaintiffs had, upon the faith of the first three cases, advanced three-fourths of their value, and Alden, Frink & Western forwarded the other eight cases under a special agreement to pay a loan made by plaintiffs, and also sent forward invoices of the eleven cases.

In the case at bar there was no special agreement respecting the wheat in question, nor was any shipping receipt sent to the consignee until after the attachment was levied. In *Haille v. Smith*, 1 Bos. & Pul. 568, an invoice of a cargo of goods, accompanied by a bill of lading indorsed in blank, was remitted to the consignee, but the cargo was prevented from leaving Liverpool by an embargo. It was held that the indorsement of the bill of lading operated as a transfer of the property to the consignee. The case of *Krudler v. Ellison*, 47 N. Y. 36; *S. C.*, 4 Am. Rep. 462; simply holds that upon a sale

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of goods and delivery to a common carrier, the title passes to the consignees, and that the consignor cannot maintain an action against the carrier for the loss. None of the cases, as we understand them, support the proposition that appellees, under the facts found by the referee, acquired a lien upon the property in question. The court should have set aside the legal conclusion in the referee's report, and rendered judgment for the defendant.

Reversed.

ON REHEARING.

DAY, J. Within the time authorized, upon the petition of plaintiffs, a rehearing was granted in this case. The defendants answered the argument of plaintiffs, and the plaintiffs, by John W. & M. E. Cary (counsel not before appearing in the case), filed a reply. The cause is now again submitted for final determination. In the petition for rehearing, and the reply to defendants' argument, counsel cite the following authorities not referred to in the original argument: *Anderson v. Clark*, 2 Bing. 20; *Cuming v. Brown*, 9 East, 506; *Virtue v. Jewell*, 4 Camp. 31; *Patten v. Thompson*, 5 M. & S. 350; *Wade v. Hamilton*, 3 Ga. 450; *Grove v. Brien*, 8 How. 429; *Bryar v. Nix*, 4 M. & W. 774; *Evans v. Nichol*, 3 Man. & G. 614; *Alden v. Temple*, 4 Bun. 2235; *Berly v. Taylor*, 5 Hill, 577.

We have examined all of these authorities with care. The most of them are cases where a bill of lading or receipt, or letter of information, was forwarded to the consignee, or advancements were made upon the faith of the particular consignment, and they fall within the principle of the cases reviewed in the foregoing opinion. If it should even be conceded that some of them would support a conclusion different from that reached in the foregoing opinion, still it cannot be denied that other cases, more directly in point, equally well considered, and of equal authority, support the doctrine of the opinion.

It is not denied that the case of *Elliott v. Bradley*, 23 Vt. 217, decided in 1851, directly supports our opinion in this case; but the authority of that case is assailed. It is stated that it was overruled in *Davis v. Bradley*, 28 Vt. 118, and that "courts and text-writers have shunned it with contempt" ever since it was announced, some twenty-seven years. This statement, so far as we are able to discover, is altogether without support. The case of *Elliott v. Bradley* is not only not overruled in *Davis v. Bradley*, 28 Vt. 118, but its correctness is there, at least impliedly recognized. In the

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sixth edition of Parsons on Contracts, edited in 1873, the case is referred to in support of the doctrine of the text, without any note of disapprobation. See page 98. In addition to the authorities alluded to in the foregoing opinion, the case of *Bonner v. Marsh*, 10 Sm. & Marsh, strongly supports the view therein announced. See, also, *Bank of Rochester v. Jones*, 4 Coms. 497. We are fully content with the doctrine announced, and the conclusion reached in our former opinion. The opinion before announced is adhered to.

DUDLEY V. SAUTBINE.

(49 Iowa, 650).

Agency—sale of intoxicating liquors by agent contrary to orders of principal—intent—ignorance of fact.

A statute inflicted a penalty for selling intoxicating liquors to any person in the habit of becoming intoxicated. The defendant instructed his servant not to sell liquors to any such person, but the servant disobeyed the direction, without the defendant's knowledge. *Held*, that the defendant was liable, and it was immaterial that he did not know that the purchaser was in the habit of becoming intoxicated.*

ACTION for a penalty. The opinion states the case. The plaintiff had judgment below.

Stiles & Burton, for appellant.

D. H. Emery and *Wm. McNett*, for appellee.

ADAMS, J. I. Section 1539 of the Code provides, in substance, among other things, that it shall be unlawful for any person, by agent or otherwise, to sell any intoxicating liquors, including wine or beer, to any person who is in the habit of becoming intoxicated, and that any person violating the provisions of the section shall forfeit and pay to the school fund \$100 for each offense.

The evidence tended to show that the defendant was the owner of a saloon; that he employed one Wiltse to take charge of it, and sell

* Compare *State v. Fitzgerald*, ante. See, contra, *Farrell v. State* (33 Ohio St. 256), 30 Am. Rep. 614.

wine and beer; that he forbade Wiltse, however, to sell to persons who were in the habit of becoming intoxicated; that Wiltse, notwithstanding the prohibition, sold, on three different occasions, beer to a person who was in the habit of becoming intoxicated; and for such sales it is claimed that the defendant is liable under the statute above cited.

The court gave an instruction, which is in these words: "If you find that the sales were made by his clerk or agent in charge of the saloon, and find that the defendant was engaged in selling wine or beer, then the defendant, under this statute, would be liable therefor the same as though the sales were made by himself, even in violation and contrary to the instructions which the defendant gave him with reference to sales to such persons."

The giving of this instruction is assigned as error. It is insisted by the defendant, that as the sale of native wine and beer is not illegal, except to minors and intoxicated persons, and persons in the habit of becoming intoxicated, the presumption is that the person engaged in the traffic will so conduct his business as not to violate the law by selling in prohibited cases; and if he positively forbids his agent to sell in the prohibited cases, and the agent disobeys, the act of the agent, in violation of both law and his employer's instructions, should not be considered as the act of the employer. The argument, briefly stated, is that the agent is employed for a lawful purpose, and no other. If he does an unlawful act, and especially if forbidden by his principal, he acts outside of his agency. And so it is argued that the statute which imposes a penalty for selling in the prohibited cases by agent has no application to this case.

We come, then, to the question as to whether the defendant can be considered as having sold the liquor in question, for as we have seen from the provision of the statute, if he sold it, the fact that he sold it by an agent would not constitute a valid defense. The defendant claims that he did not sell it. The question as to whether he did or not depends upon whether Wiltse was the defendant's agent in making the sales.

Wiltse was employed to sell wine and beer, and while it is true that in one sense, he was not employed to sell to persons in the habit of becoming intoxicated, he was employed to determine who, among those applying to purchase, were in such habit, and to sell to persons who were not. We think, then, that the agent's fault did not consist in doing what was beyond the scope of his agency, but

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in doing improperly what was within it. Most certainly a principal cannot escape civil liability for his agent's negligence by instructing him not to be guilty of negligence.

It has been held, it is true, that a principal is not liable for a sale of liquor made by his agent contrary to statute, if made without the principal's knowledge or consent. *State v. Hipp*, 5 Blackf. 149. In that case a sale was made by an innkeeper's barkeeper to an intoxicated person, in violation of a statute prohibiting such sales. But we are not disposed to attach much importance to that decision as an authority in the present case. It seems to have been based upon *State v. Pennybaker*, 2 Blackf. 484, in which it was held that a sale of liquor made by a wife in the name of her husband who had no license, did not render him liable, the sale having been made without his knowledge or consent. But it will be seen that the principal involved in *State v. Hipp* is different from that involved in *State v. Pennybaker*. In the former case the barkeeper was employed to sell liquor to persons not intoxicated, and he was employed to observe and determine who among those desiring to purchase were not intoxicated. In the case where the wife whose husband was not licensed sold liquor, she did not merely fail in the proper discharge of her duty, but she acted entirely outside of her duty, for she was not employed to sell liquor at all. We must be permitted, therefore, to express a doubt whether the case of *State v. Hipp* is supported by the authority upon which it is based.

Furthermore, our statute expressly provides that a principal shall be liable for sales made by his agent; and while the question in the case at bar is as to whether the sales made by Wiltse should be considered as made by him as agent, he having been forbidden to sell to persons in the habit of becoming intoxicated, we think that the statute throws some light upon that question. The law imposes upon the vendor of wine and beer the duty of discriminating between persons who are in the habit of becoming intoxicated and those who are not, and provides, in effect, that if he employs an agent to make the discrimination and to sell in cases not prohibited, and his agent sells in prohibited cases, he shall still be liable. The mere fact that the agent is forbidden to sell in prohibited cases does not determine that he is not to be regarded as agent if he does. The powers of the agent are not less by reason of his being forbidden. His duty, whether forbidden or not to sell in prohibited cases, is to make the proper discrimination and to sell only in cases not prohibited. We

may then throw out of consideration the fact that he was forbidden, and it results that under the provisions of the statute the principal must be held liable. This certainly must be so unless the principal's liability is limited to cases where the agent is employed with the understanding that he is to violate the statute. But we think that it is not so limited. Where a person employs another with the understanding that he is to commit a criminal offense in pursuance of his employment, the employer is guilty independent of any statutory provision to that effect.

II. The defendant assigns as error the giving of an instruction in which the jury was told, in substance, that it was immaterial whether the defendant knew that the person to whom he sold liquor was in the habit of becoming intoxicated. It is insisted that without such knowledge there could be no guilty intent.

This doctrine finds support in *Stern v. State*, 53 Ga. 229; S. C., 21 Am. Rep. 266, but such, we think, is not the law. In *Commonwealth v. Waite*, 11 Allen, 264, the defendant was indicted for selling milk mixed with water. It did not appear that the defendant knew that the milk was mixed with water, and so he claimed that he could not be convicted because it did not appear that he had been guilty of any fraudulent intent. But the court said: "It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud and to adapt the protection to the nature of the case. They have seen fit to require that every person who sells milk shall take the risk of selling a pure article. No one is obliged to go into the business, and by using proper precautions any dealer can ascertain whether the milk he offers for sale has been watered." So it may be said that no person is obliged to go into the business of selling wine and beer, and by using proper precautions he can ascertain whether a person who applies to purchase is in the habit of becoming intoxicated. If he omits the use of proper precautions and sells to such persons the offense consists in the carelessness. No one, we presume, would claim that a person violating the game law could escape its penalties by pleading ignorance of the day of the month upon which he committed the act in violation of it. He is presumed to know the law, and must take notice, at his peril, when the time begins and expires during which the acts designed to be prohibited are declared unlawful. The general doctrine upon this subject is set forth in *Greenleaf on Evidence*, vol. 1, § 21. The author says: "Where a statute commands that an act

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be done or omitted, which, in the absence of such statute, might have been done or omitted without culpability, ignorance of the fact or state of things contemplated by the statute, it seems will not excuse its violation." See, also, *Jamison v. Burton*, 43 Iowa, 282; *State v. Hatfield*, 24 Wis. 60; *Reg. v. Prince*, L. B., 2 C. C. R. 154; S. C., 13 Moak's Eng. Rep. 885.

We think that the judgment of the Circuit Court should be

Affirmed.

ON REHEARING.

ROTHROCK, Ch. J. I. This cause has again been submitted to us upon a petition for rehearing.

It is elaborately argued by counsel for appellant that the rule of the opinion that the seller of wine and beer is bound to know at his peril, whether the persons to whom he sells are within the prohibited classes, is erroneous.

We are aware that a different rule has been adopted in Indiana and Ohio, and possibly in other States; but, nevertheless, we see no reason to overrule the decision in *Jamison v. Burton*, 43 Iowa, 282, supported as it is by *State v. Hatfield*, 24 Wis. 60, and *McCutcheon v. People*, 69 Ill. 601.

It is said by Professor Greenleaf, in vol. 3, § 21 of his work on evidence: "Thus, for example, when the law enacts the forfeiture of a ship having smuggled goods on board, and such goods are secreted on board by some of the crew, the owner and officers being alike innocently ignorant of the fact, yet the forfeiture is incurred notwithstanding their ignorance. Such is also the case in regard to many other fiscal, police and other laws and regulations, for the mere violation of which irrespective of the motives or knowledge of the party, certain penalties are enacted; for the law in these cases seems to bind the party to know the facts, and to obey the law at his peril.

II. The defendant asked the following instruction, which was refused: "You are further instructed that if you find the defendant had in his employ, as clerk in his establishment, one Springer or other person, during a portion of the time alleged, and also find that he sold wine or beer to some one of the persons alleged within such time; and you should also find that such person to whom such sale was made was in the habit of becoming intoxicated, still this would not justify a verdict against the defendant, if you should find that

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such sale or sales were made by said Springer or other person, without the knowledge, acquiescence or assent, but against the express direction of the defendant."

It is insisted that this instruction means that if the jury should find that the defendant expressly directed his clerk not to sell wine or beer to the persons named in the complaint or information, then the defendant was not liable.

The rule of the foregoing opinion is that the defendant is liable notwithstanding he may have directed his clerk or agent generally not to sell to the classes of persons to whom sales are prohibited by the statute. The rule claimed for the above instruction is that the defendant is not liable if he directed his clerk not to sell to certain specified individuals. Conceding that the instruction bears the interpretation claimed for it, still we are of the opinion that the defendant would be liable.

The law expressly makes him liable for the acts of his clerk or agent in selling the wine or beer to the prohibited classes. As we have held that he is liable to the penalty whether he knows the purchaser is one of a prohibited class or not, and that he acts at his peril, upon the same principle it must be held that he is responsible for the violation of the law by his clerk, whether he knew that the law was violated or not. He is the owner of the establishment, and places a clerk in charge to sell his property, and he must, at his peril, see that no sales are made in violation of law. In other words, the law holds him responsible for the acts of his clerk or agent, no matter what his private instructions may have been to his clerk.

Former opinion adhered to.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

FRANKHOUSER V. ELLETT.

(23 Kans. 137.)

Chattel mortgage — retention of possession by mortgager — fraud.

Under the statutes of Kansas a chattel mortgage may contain a valid stipulation for the retention of possession by the mortgagor of the mortgaged property, and possession so retained is not, when the mortgage is duly filed, either *per se* or *prima facie* fraudulent as against creditors or subsequent purchasers.

Where a mortgage is given on a stock of goods, with a stipulation for possession by the mortgagor, and by agreement outside the mortgage the mortgagor is permitted to continue disposing of the goods in the ordinary course of business, and to use a portion of the proceeds thereof in the support of his family, paying the remainder over in discharge of the mortgage debt, the whole transaction is not thereby, as matter of law, rendered fraudulent and void as against creditors and subsequent purchasers, but will be upheld or condemned according as the arrangement is entered into and carried out in good faith, or not. (*See note, p. 178*)

REPLEVIN. The opinion states the facts. The plaintiff had judgment below.

William Thomson, for plaintiff in error. The main statutes of Kansas which bear upon the subject of the registration of chattel mortgages are section 3 of "An act for the prevention of frauds and perjuries" (chap. 43 of Gen. Stat.), and section 9 of article 2 of chapter 68 of the General Statutes, both of which sections took

effect October 31, 1868. These two sections are, to all intents and purposes, the same as the New York provisions, unless the provision at the end of section 3, "this section shall not interfere with the provisions of law relating to chattel mortgages," makes a difference. We contend that the effect of the two statutes of Kansas will be exactly the same without as with that provision.

Our statute does not, like the enactments of some States, contain the express provision that the filing of the mortgage shall operate and have the same effect as a change of possession. Such a provision is contained in the Iowa statutes concerning the filing of chattel mortgages, and therefore, the decision of the Iowa court, upon which the defendant in error so fully relies, is no proper rule for guidance in Kansas.

The doctrine that "an oral agreement between the mortgagor and the mortgagee of chattels that the former shall retain possession of the goods and sell them in the regular course of his business and apply the proceeds to his own use in the support of his family and otherwise," renders the mortgage void as to the creditors of the mortgagor, has been universally held to be the law in the States of Ohio, Minnesota, Illinois, Alabama, New Hampshire, Missouri, Indiana, Georgia, Tennessee, Wisconsin and New York. *Griswold v. Sheldon*, 4 N. Y. 581; *Freeman v. Rawson*, 5 Ohio St. 1; *Harman v. Abbey*, 7 id. 218; *Place v. Longworthy*, 13 Wis. 704; *Jordan v. Turner*, 3 Blackf. 309; *Herman on Chattel Mortgages*, 238; *Robinson v. Elliott*, 22 Wall. 513.

Ruggles, Scott & Lynn, James Rogers and E. M. Sanford, for defendant in error.

BREWER, J. Action of replevin. Judgment in favor of plaintiff, defendant in error, to review which this proceeding in error has been brought. Passing by all preliminary questions as to the sufficiency of the record, we pass to a consideration of the substantial matters in dispute. The case was tried by the court, without a jury, and upon an agreed statement of facts.

This statement of facts shows that, on March 9, 1876, one Charles J. Kendall was indebted to the defendant in error, Ellett, for money borrowed (\$3,268.43) and as an accommodation indorser for \$2,500. To secure this, Kendall executed to Ellett the chattel mortgage set out in the record, which was recorded in the proper

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office on March 10, 1876. This borrowed money became due about May 9, 1876. The notes on which Ellett was indorser became due respectively about March 24, 1876, and about April 14, 1876. About May 13, 1876, Tenant, Walker & Co. sued out an attachment against said Kendall, which came into the hands of plaintiff in error, an officer, and on said day a portion of the property so mortgaged was seized by said officer, under said attachment; and thereupon this action of replevin was commenced by Ellett, an order of deliverance duly issued, and the said attached property taken and delivered to Ellett. The decision of this case depends upon the question as to whether or not this mortgage is valid. The stipulations in the chattel mortgage, so far as material, are in these words:

“The property sold is to remain in the possession of the said party of the first part, until default be made in the payment of the debt and interest and indorsed notes aforesaid, or some part thereof, but in case of a sale or disposal, or attempt to sell or dispose of the same, or a removal of or attempt to remove the same from said county of Osage, or an unreasonable depreciation in the value, or if from any other cause the security shall become inadequate, the said party of the second part may take such property, or any part thereof into his possession; and upon taking such property into his own possession, either in case of default or as above provided, said party of the second part shall sell the same at public or private sale, and after satisfying the aforesaid debt and interest thereon, and all necessary and reasonable costs, charges and expenses incurred, out of the proceeds of sale, he shall return the surplus to said party of the first part, or his legal representatives; and if from any cause said property shall fail to satisfy said debt and interest aforesaid, said party of the first part hereby agrees to pay deficiency.”

It is admitted that the notes secured by said mortgage represented a valid and *bona fide* indebtedness of said Kendall. There is no admission, that at the time said mortgage was executed, Kendall had or ever entertained any idea or intention, by its execution or otherwise, to hinder, delay or defraud his creditors; nor is there any evidence of any such idea or intention, unless it can be said, as matter of law, from all the facts in the agreed statement, that he had such intention.

It is agreed that Ellett had no knowledge, at the time the mortgage was given, that Kendall intended either to hinder, delay or defraud his creditors, unless the facts of which he did have knowl-

edge should be deemed knowledge of such intention, and that he took the mortgage in good faith for the purpose and with the intention solely of securing his said claim against said Kendall, unless the facts stated show a want of good faith.

The only other facts in the statement that can be material are: That at the time the mortgage was given Kendall owed several parties in different amounts, aggregating about \$1,850; that the mortgage in question covered all Kendall's property except about \$2,000 in accounts, \$1,600 of which were considered by Kendall to be good, and three town lots valued at twenty-seven dollars and fifty cents. Ellett had knowledge that some of these claims were sent to the bank, of which he was president, for collection and that K. could not pay his indebtedness in the usual course of his business. At this time K. made an effort to get extensions from all his creditors except Ellett; and before he got these extensions Ellett consulted an attorney, under whose advice the mortgage was given, said attorney informing Ellett that if the mortgage was duly filed for the period of two months the lien created by it would be valid. The mortgage was executed. Kendall got his extensions "under the impression and with the hope that before said indebtedness could again mature he would be able to sell his entire stock of goods and pay his debts, and with the hope of avoiding the odium of having failed in business." Kendall did not inform these creditors that he was about to give this mortgage. After the execution of said mortgage Kendall, with the consent, knowledge and agreement of Ellett, continued in his business of general merchant, and with Ellett's consent and agreement held and controlled said mortgaged goods, disposed of the same in the usual way, received and controlled the proceeds and made deposit thereof, amounting to \$1,350, in the Osage City Savings Bank, in the name of Ellett, for the purpose of having the same applied to the refunding to Ellett money advanced by him to take up the note of \$2,000 to said bank, upon which Ellett was accommodation indorser as aforesaid, and which \$1,350 was so applied. Kendall was permitted to buy goods to replenish the stock and check upon Ellett's account in said bank to pay for same, and did so check to the extent of about \$400 for a few necessary staple goods to keep said stock in order, which goods were bought and shipped in Kendall's name and placed in his store-room with the said mortgaged goods, but were always so kept by K. separate from the mortgaged goods. Kendall, also, with the knowledge and con-

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sent of Ellett, used groceries and goods out of his store, and said mortgaged goods and money derived therefrom, necessary to support his family from the time the mortgage was given, March 9, 1876, to May 13, 1876. It may be added that Tenant, Walker & Co. and said plaintiff in error had actual notice and knowledge of said mortgage at the time of said levy under the attachment, and that Ellett protested against the levy.

The statutes of Kansas that have any bearing upon this subject are section 3 of the act for the prevention of frauds and perjuries, which reads: "Every sale or conveyance of personal property unaccompanied by an actual and continued change of possession shall be deemed *to be void*, as against purchasers without notice and existing or subsequent creditors, *until* it is shown that such sale was made in good faith and upon sufficient consideration. This section shall not interfere with the provisions of law relating to chattel mortgages." And section 9 of article 2 of chapter 68: "Every mortgage or conveyance intended to operate as a mortgage of personal property which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged shall be *absolutely void*, as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees in good faith, *unless* the mortgage, or a true copy thereof, shall be forthwith deposited in the office of the register of deeds in the county where the property shall then be situated, or if the mortgagor be a resident of this State then of the county of which he shall at the time be a resident."

The first proposition of counsel for plaintiff in error is, that as the possession of the mortgaged property was retained by the mortgagor, the mortgage, although duly filed in the office of the register of deeds, must be deemed to be void as against creditors, until shown to have been made in good faith and upon sufficient consideration, and that no such showing having been made, the district court erred in not holding the mortgage void. In other words, he contends that the same rule applies in mortgages as in sales, and that retention of possession is presumptive evidence of fraud; that the failure to deposit the mortgage in the register's office renders the instrument absolutely void, while the depositing does not make it even *prima facie* valid. Depositing is absolutely essential to the validity of a chattel mortgage; without it none can be enforced against creditors. Delivery of possession of the mortgaged property or proof of good

faith and sufficient consideration, is also essential; so that a mortgagee must prove more than a vendee. A party who claims only a lien, must do more to make his lien good than one who claims full title. Of course a legislature may so order, but its language should be explicit. A doubt would be solved against an intention to so order.

In support of his views counsel has furnished us with an elaborate argument, fortified by an abundant citation of authorities. Yet we cannot agree with his law or assent to his view of the facts. An examination of the authorities would be useless; to reconcile them is impossible. It will be sufficient to state our conclusions and refer to a few of the leading authorities sustaining them.

There is nothing inherently vicious or against public policy in a mortgage. The right to mortgage is an incident to ownership. As a man may sell, so may he mortgage his personal property. Possession is not an essential element of title. A man may own property in another's possession. This is universally recognized in cases of loan, agency and bailment; and the owner in such cases, does not forfeit his title or the right to assert and protect it even against third parties, by the mere fact of non-possession. If an owner may surrender his possession without losing title, why may not one acquire a good title without acquiring possession? Must the origin of title be accompanied by possession, to make it perfect against third parties? There seems to be no sufficient reason therefor. A failure to deliver possession may be evidence tending to show no sale or a lack of good faith; but as a delivery of possession is not essential to a transfer of title, a want of it is not conclusive evidence that there was no sale. A sale or mortgage is good *inter partes* without delivery of possession; so the authorities agree. If it is void as against creditors, it should be because some wrong is thereby done to them; but if the transaction is in good faith and they have notice of it, wherein are they wronged? If they claim that they are wronged ought they not to prove the fact?

A mortgage is a lien. The grantor does not purport to transfer his entire interest. He retains all not necessary to perfect the security. Possession may be of little benefit to the grantee, but of great benefit to him. Why should he, after notice is given to the world of what has been done, be compelled to surrender that which is of so much benefit? A mortgage differs from a pledge, in that possession is necessary to perfect the latter and not the former. If

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possession is not necessary, why should a lack of it be held a wrong? Why should that which is right in and of itself be considered evidence of wrong?

But it may be said that third parties presuming title from possession, may be misled, to their prejudice. But with notice they cannot be misled. Registration is notice.

Again, it is said that such a transaction may be used as a cover for wrong. So may almost any transaction. A delivery of possession is not conclusive against wrong. Why should a legitimate transaction be condemned because improper use may be made of it? But the statute concerning sales says a failure to deliver possession is *prima facie* evidence of wrong as against creditors. True; but in sales there is no registration, and therefore no notice. In mortgages there is registration and notice.

Again, the statute impliedly grants the right to stipulate for a retention of possession by the mortgagor. Gen. Stat. p. 585, § 15. Can that which the legislature authorizes to be done be construed to be evidence of wrong? Can an act done in pursuance of law be adjudged fraudulent *per se*, or even evidence of fraud?

Briefly, then, we hold that the statute authorizes a stipulation in a chattel mortgage for a retention of possession by the mortgagor, and that a possession retained in accordance with the terms of such mortgage is not, when the mortgage is duly filed, *per se* fraudulent, or even *prima facie* evidence of fraud, as against creditors or subsequent purchasers. *Gay v. Bidwell*, 7 Mich. 521; *People v. Bristol*, 35 id. 28; *Hughes v. Cory*, 20 Iowa, 399; *Smith v. McLean*, 24 id., 322; *Briggs v. Parkman*, 2 Metc. (Mass.) 258; *Jones v. Huggesford*, 8 id. 515; *Googins v. Gilmore*, 47 Me. 9; *Brett v. Carrier* (U. S. Dist. Ct.), 3 Cent Law Jour. 286; *Hunter v. Corbett*, 7 U. C. Q. B. 75; *Bullock v. Williams*, 16 Pick. 83; *Forbes v. Parker*, 16 id. 466; *Shurtleff v. Willard*, 19 id. 211; *Miller v. Whitson*, 40 Mo. 97; *Harrington v. Brittan*, 23 Wis. 541; *Call v. Gray*, 37 N. H. 428; *Robinson v. Elliott*, 22 Wall. 513; *Golden v. Cockril*, 1 Kans. 267. Neither can we concur in the view taken by the learned counsel of the facts. They having been agreed to, this court can consider them as readily and fully as the district court. *K. P. Rly. Co. v. Butts*, 7 Kans. 308. And our conclusion agrees with that of the district court, rather than that of counsel. We think the facts show good faith and sufficient consideration.

[Omitting the discussion of facts.]

Another proposition of counsel is, that conceding good faith, the mortgage must be held invalid, because by agreement outside the mortgage the right to dispose of the goods and use the proceeds in support of his family was reserved to the mortgagor. It is claimed that though the parties act in the utmost good faith, still the law will not sanction a transaction like that. Again we must dissent from counsel. We think the rule to be that, where a mortgage is given upon a stock of goods, and by agreement outside the mortgage the mortgagor is permitted to continue the business and dispose of the goods in the ordinary way, and use some portion of the proceeds in the support of his family, the transaction will be upheld or condemned according as it is entered into and carried out in good faith, or not. The mortgagor, if he may keep the possession, may as well make the sales as a stranger. He acts in that respect as a *quasi* agent at least of the mortgagee, and as such agent and salesman is entitled to compensation for his services. Doubtless such arrangements are liable to abuse, and should always be closely scanned; but still they are not absolutely and in all cases to be adjudged void as matter of law. See, in support of this, the authorities heretofore cited.

There being no other question in this case, the judgment will be affirmed.

VALENTINE, J., concurring.

NOTE BY THE REPORTER. — We are induced to report this case contrary to our custom to omit cases decided by a majority of only one, and notwithstanding it in some degree depends on local statutory construction, on account of the fact that it seems to be the first decision of the Kansas court on the question, and on account of the intrinsic interest and importance of the subject, as well as because of the great and nearly evenly-balanced conflict of opinion on the subject in the different States and the recent writings on the subject in influential law periodicals.

We refer the reader to articles as follows: By James O. Pierce, 2 South. L. Rev. (N. S.) 731; 6 *id.* 96; by Leonard A. Jones, 5 *id.* 617; by W. J. Gaynor, in 20 Alb. L. J. 506; and by J. Tarbell, 21 *id.* Mr. Jones says, of the New York decisions, "they have very little in them to deserve commendation." In spite of that, it must be admitted they are substantially followed in Illinois, Minnesota, Missouri, Nebraska, New Hampshire, Ohio, Tennessee and Texas, Virginia and Wisconsin. In Indiana the rule is still more strict. On the other hand, the courts of Alabama, Georgia, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, North Carolina and Rhode Island, have pronounced that the mortgagor's possession, with power of disposal, is only *prima facie* evidence of fraud. In this equal numerical division, the Federal Supreme Court incline the scale to the New York side. Mr. Jones concludes: "That the doctrine of absolute fraud arising in a mortgage of merchandise from the mortgagor's retaining possession, with a power of disposal in the usual course of trade, is not supported by any preponderance of authority; that it is contrary to sound principles of jurisprudence; that it has no reason for its existence, derived from general observation and experience; that it is contrary to sound policy; and that the qualifications of the doctrine made by leading courts have, in a large measure, destroyed its force and are indicative that those courts

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wish themselves well rid of the whole of it, and soon will be." Mr. Pierce makes a somewhat different enumeration. He says, 6 South. L. R. 111:

"This brings us to the question of the preponderance of authority. It is probably not necessary to produce a numerical excess of cases, or to find a numerical majority of courts in favor of a given proposition, in order to establish preponderance. If the courts of the various States where the question has arisen were evenly divided, twelve on each side, as suggested in the late Review article, it would then seem proper and becoming to allow the opinion of the Supreme Court of the United States to override all State jealousies and differences of opinion. But the arithmetic of that article will bear some slight revision. From the list of twelve States there given, whose courts oppose the doctrine in question, should probably be taken Maryland, Rhode Island, Georgia and North Carolina, leaving eight as the number; to which is now to be added Kansas." (Referring to the principal case.) "The courts in Maryland and Rhode Island have not considered or passed upon the question of fraud in this class of cases, as is conceded in the reference made in that article to their decisions. The Georgia cases rest upon a statute which legalizes, to a certain extent, mortgages upon stocks of goods in trade; and such cases can scarcely be authority upon a common-law question. Of this very statutory privilege the Georgia court says, in *Goodrich v. Williams*, 50 Ga. 425, that 'though a very convenient privilege it is one very easily used to commit fraud;' which furnishes an index to the view that court would take of the common-law question, if at liberty to do so. In the latest case on the subject in North Carolina, *Cheatham v. Hawkins*, 80 N. C. 161, the preceding cases were reviewed, and the decision was adverse to the validity of the transaction in question, on the ground of 'a legal presumption arising from the facts,' which even proof of a *bona fide* intent could not remove; for, it was said, 'acts fraudulent in view of the law because of their necessary tendency to delay or obstruct the creditor in pursuit of his legal remedy, do not cease to be such because the fraud as an independent fact was not then in mind;' as authority for which ruling the New York, Ohio and Tennessee cases were cited. So, though the court unnecessarily rested its judgment on an imputed intent of the parties, it would seem that North Carolina was assigned to the wrong side of the controversy by the learned author of the Review article.

"In addition to North Carolina, there should be added to the States occupying the affirmative side of this question Connecticut and Pennsylvania, for the reasons already given in the article in the second volume of this Review, p. 731; and also Colorado, whose Supreme Court, in *Bank v. Goodrich*, 3 Col. 139, held the doctrine in question to be 'too well settled to require argument.'"

"It thus appears that in sixteen of the States it is held as a common-law doctrine that a mortgage of the class in question is fraudulent in law—actually fraudulent—while in nine of the States the contrary is held as a common-law doctrine; this enumeration excluding all those States where the question has not been directly adjudicated as a common-law question. On the side of this numerical preponderance are also found the Supreme Court of the United States, and the United States Circuit and District Courts in seven of the States, two of the latter being Oregon and Nevada, in which the State courts have not had occasion to consider the question."

To the minority must be added the cases of *Brett v. Carter*, U. S. Dist. Ct., Mass. (2 Low, 458). The Connecticut cases referred to by Mr. Pierce are *Pettibone v. Stevens*, 15 Conn. 26; *Bern v. Bateford*, 13 id. 154; *Welsh v. Bekey*, 1 Penn. 57; *Clow v. Woods* (5 S. & R. 275), 9 Am. Dec. 846; *Hoyer v. Gessaman*, 17 id. 251; *McKibbin v. Martin*, 64 Penn. St. 352; *S. C.*, 3 Am. Rep. 588. The article in the Albany Law Journal is confined to the New York cases, the latest of which is *Southard v. Pinckney*, 5 Abb. N. C. 184, in the Court of Appeals.

In the principal case, HORTON, Ch. J., dissents as follows:

"I do not concur in the decision in this case. I am clearly of the opinion that a chattel mortgage upon a stock of goods in trade which permits by its conditions the mortgagor to remain in possession of the property and to dispose of it by sale in due course of trade until the maturity of the debt proposed to be secured by it, is fraudulent in law as to the creditors of the person making the same, and as to subsequent purchasers, and is absolutely null and void as to them without reference to the *bona fides* of the mortgaged debt, or the intention of the mortgagor as to fraud. I further hold that if the power of disposition does not appear upon the face of the mortgage, but is so understood or agreed by the parties at the time the mortgage is executed, it is equally void; and in continuation of the same views it seems to me that the license allowed to the mortgagor in this case to continue in his business of merchandising and to dis-

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pose of the mortgaged goods and chattels to purchasers in his usual way, to receive and largely control the proceeds of the sales, to use portions of the goods, together with sufficient of the money derived in the business to support himself and family, make the chattel mortgage in issue absolutely null and void as to creditors and subsequent purchasers, at least until the license is revoked by the mortgagor. After all, with such a license in force, the so-called mortgage resolves itself merely into personal security. The power granted to the mortgagor by the mortgagee enables the latter to defeat the provisions of the instrument. For the time being the exercise of this power destroys it. It is completely *felo de se*.

"Again, this mortgage, accompanied with the license to the mortgagor, is of no great advantage to the mortgagee, but benefits the debtor, and is exceedingly injurious to other creditors. Indeed, its main purpose is as a ward to keep off other creditors. When agreements are made to hinder and delay creditors, the law imputes to them a fraudulent purpose, and therefore, they are held null and void. I think a like imputation lies against the arrangement of the parties to this chattel mortgage, and that upon the agreed statement of facts judgment should have been rendered in favor of the plaintiff in error. In support of these views I refer to the following: *Robinson v. Elliott*, 22 Wall. 513; *Collins v. Myers*, 16 Ohio St. 547; *Freeman v. Ransom*, 5 Id. 1; *Harman v. Abbey*, 7 Id. 218; *Griswold v. Sheldon*, 4 Comst. 581; May on Vol. and Fraudulent Conveyances, 126; *Twyne's Case*, 3 Coke, 80; *Ryall v. Rowles*, 1 Ves. Sr. 348; *Worceley v. De Mattos*, 1 Burr. 467; *Paget v. Perchard*, 1 Esp. 205; *Wordall v. Smith*, 1 Campb. 332; *Lang v. Lee*, 3 Rand. 410; *Addington v. Etheridge*, 12 Gratt. 436; *McLachlan v. Wright*, 3 Wend. 348; *Diover v. McLaughlin*, 2 Id. 596; *Wood v. Lowry*, 17 Id. 492; *Stoddard v. Butler*, 20 Id. 507; *Edgell v. Hart*, 13 Barb. 380; *Edgell v. Hart*, 9 N. Y. 213; *Gardner v. McEwen*, 19 Id. 123; *Mittnacht v. Kelly*, 3 Keyes, 407; *Russell v. Winne*, 37 N. Y. 591; *Coburn v. Pickering*, 3 N. H. 415; *Ranlett v. Blodgett*, 17 Id. 298; *Pulnam v. Osgood*, 52 Id. 148; *Horton v. Williams*, 21 Minn. 187; *Place v. Langworthy*, 13 Wis. 629; *Steinart v. Deuster*, 23 Id. 136; *Bishop v. Warner*, 19 Conn. 460; *Davis v. Ransom*, 18 Ill. 396; *Barnet v. Fergus*, 51 Id. 352; *Walter v. Wimer*, 24 Mo. 63; *Stanley v. Bunce*, 27 Id. 269; *Armstrong v. Tuttle*, 34 Id. 432; *Lodge v. Samuels*, 50 Id. 304; *Walt v. Bikey*, 1 Penn. 57; *Hower v. Geesaman*, 17 S. & R. 251; *National Bank v. Ebbel*, 9 Hink. 133."

A very recent case is *Harman v. Hoskins*, 56 Miss. 142. The court there say:

"The general rule, supported by authorities of greatest weight and sustained by the best of reason, is that where a mortgage is made of an entire stock of goods, which includes all other articles of like nature that may be put in the store and be on hand when default is made, the mortgagor remaining in possession and selling in the usual course of business, and making purchases to replenish the stock, it is fraudulent as to creditors. The subject is ably considered in *Robinson v. Elliott*, 22 Wall. 513, and *Collins v. Meyers*, 16 Ohio, 547. See, also, *Simmons v. Jenkins*, 76 Ill. 479; *Freeman v. Ransom*, 5 Ohio St. 1; *Hutman v. Osgood*, 51 N. H. 192. Many other cases might be cited. If the arrangement fairly deducible from the trust-deed was to allow the grantor to retain possession and make sale of the goods for his own benefit, the security will not avail against creditors. *Simmons v. Jenkins*, 76 Ill. 479; *Horton v. Williams*, 21 Minn. 187.

"If the mortgagor is to reap benefit by a business continued in that mode, the security would be invalid against a judgment creditor. *Gardner v. McEwen*, 19 N. Y. 123; *Edgill v. Hart*, 3 Seld. 213; *Russell v. Winne*, 37 N. Y. 594.

"There has been much discussion of late years, as to the extent a debtor may encumber future acquisitions to secure his creditor. The subject was considered in *Harman v. Robt*, 52 Miss. 657. That it may be done to a limited extent and upheld against other creditors, the authorities undoubtedly teach. We do not think that a mortgage of a stock of goods remaining with the mortgagee for sale and replenishment so as to make it attach to the substituted goods, and the notes and accounts, and other forms of credit for which they may be sold, is valid in law. There are a class of cases which hold that if the mortgage includes an existing stock, and replenishments from time to time made, it may be good if the mortgagee takes possession before the lien of a creditor is acquired. *Hunt v. Bullock*, 23 Ill. 323; *Simmons v. Jenkins*, 76 Ill. 483. But with that class of cases we have no concern."

See on this subject, generally, *Williams v. Briggs*, 11 R. I. 176; *S. C.*, 23 Am. Rep. 518; *Kline v. Katzenberger*, 20 Ohio St. 110; *S. C.*, 5 Am. Rep. 630; *McCaffrey v. Woodin*, 65 N. Y. 459; *S. C.*, 22 Am. Rep. 644, and note, 653; *Moore v. Byrum*, 10 S. C. 452; *S. C.*, 30 Am. Rep. 53, and note, 63.

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CHALLISS v. MCCRUM.

(33 Kana. 157.)

Negotiable instruments—indorsement without recourse—warranty of prior signatures.

One who transfers a negotiable promissory note by indorsement without recourse impliedly warrants the genuineness of the prior signatures, and that so far as he is concerned the paper expresses the exact legal obligations of all such prior parties.

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below.

W. W. Guthrie, for plaintiff in error. There is no implied warranty in the sale of chattels. *Gill v. Cubbitt*, 3 B. & C. 466; *Pringle v. Phillips*, 5 Sandf. 157; *Holbrook v. Mix*, 1 E. D. Smith, 154; *Hall v. Hale*, 8 Conn. 336; 32 Vt. 125; 18 Wend. 448.

In order to constitute a warranty there must be some distinct assertion or affirmation made during a negotiation for sale, which it may be supposed was intended to cause the sale and was operative in causing it. 1 Pars. on Cont. 572; *Marsh v. Webber*, 13 Minn. 109; *Dumont v. Williamson*, 18 Ohio St. 515.

W. D. Webb, for defendant in error.

BREWER, J. On December 4, 1871, plaintiff in error loaned one Edward A. Ege \$250 and took his note therefor in the sum of \$265, payable to Richard Probasco or bearer and secured by mortgage. Long after its maturity, and in 1876, several payments having been made thereon in the meantime, plaintiff in error sold the note for its then face value to defendant in error. At the time of such sale he indorsed it: "Without recourse. W. L. Challiss." McCrum sued on the note. Ege plead usury. The plea was sustained and McCrum recovered \$229.90, less than the face value of the note, for which sum he brought this action. A demurrer to the petition was overruled, and this ruling is now presented for review. Can the action be sustained? Of course no action will lie on the indorsement, for by his

Written contract Challiss expressly declines to assume the liabilities of an indorser. If sustainable at all it must be as against him as a vendor and not as an indorser, and upon the doctrine of an implied warranty. The theory of the defendant in error is that every vendor of a bill, bond or note impliedly warrants that it is, what it purports on its face to be, the legal obligation of the parties whose names appear on the instrument, and that the character of the indorsement, or the lack of an indorsement, in no manner affects this implied warranty. On the other hand the counsel for plaintiff in error lays down the broad proposition that "there is no such thing as implied warranty in the sale of chattels," and that in the absence of express warranty, the maxim *caveat emptor* is of universal application. It is clear that the character of the indorsement cuts no figure in the question; as stated, no action will lie on it. But further, the restriction is only as to his liability as indorser, and in no manner affects his relation to the paper as vendor. An unqualified indorsement is the assumption of a conditional liability. The indorser becomes a new drawer, and is liable on the default of the drawee. "Without recourse," does away with this conditional liability. It leaves the indorsement simply as a transfer of title, and the indorser liable only as vendor; yet it leaves him a vendor and divests him of none of the liabilities of a vendor. It makes the transaction the equivalent of a delivery of paper payable to bearer, and transferable by delivery. *Hannum v. Richardson*, 48 Vt. 508; *S. C.*, 21 Am. Rep. 152. Independent, therefore, of any matter of indorsement, what implied warranty is there in the transfer of a promissory note? Two things are clear under the authorities: First, that there is an implied warranty of the genuineness of the signatures; and second, that there is no warranty of the solvency of the parties. It is unnecessary to more than refer to a few of the authorities upon these propositions: *Byles on Bills*, pp. 123, 125 and cases in notes; *Jones v. Ryde*, 5 Taunt. 488; *Gurney v. Womersley*, 4 El. & Bl. 132; *Gompertz v. Bartlett*, 24 Eng. Law. & Eq. 156; *Terry v. Bissell*, 26 Conn. 23; *Merriam v. Wolcott*, 3 Allen, 259; *Aldrich v. Jackson*, 5 R. I. 218; *Lobdell v. Baker*, 3 Metc., 469; 1 Add. on Cont., p. 152; *Ellis v. Wild*, 6 Mass. 321; *Eagle Bank v. Smith*, 5 Conn. 71; *Shaver v. Ehle*, 16 Johns. 201; *Dumont v. Williamson*, 18 Ohio St. 515; 2 Pars. on Notes and Bills, ch. 2, § 2. But in the case at bar the signature of the maker was genuine. The objection is that it was never his legal obligation to the full amount for which it pur-

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ported to be. How far is there any implied warranty in this respect? A reference to some of the leading cases will throw light upon this question.

In *Thrall v. Newell*, 19 Vt. 203, it appeared that one of the makers of a note was insane. The vendor made a written assignment, in which was a description of the note, and the court construed this as an express warranty that the instrument was the legal obligation of the apparent makers, and one being incapable of contracting, gave judgment against the vendor on account of this breach for the amount received by him. While the judgment of the court is rested upon the fact of an express warranty, the judge who writes the opinion expresses his individual conviction that the same result would follow on a mere transfer without any express warranty, and quotes approvingly an extract from Rand's edition of Long on Sales, that "there is an implied warranty in every sale that the thing sold is that for which it was sold."

In *Lobdell v. Baker*, 3 Metc. 469, it appeared that the owner of a note procured the indorsement of a minor, and then put the paper in circulation. He was held liable to a subsequent holder. Chief Justice SHAW, delivering the opinion of the court, says:

"Whoever takes a negotiable security is understood to ascertain for himself the ability of the contracting parties, but he has a right to believe without inquiring, that he has the legal obligation of the contracting parties appearing on the bill or note. Unexplained, the purchaser of such a note has a right to believe, upon the faith of the security itself, that it is indorsed by one capable of binding himself by the contract which an indorsement by law imports."

In *Hannum v. Richardson*, 48 Vt. 508; S. C., 21 Am. Rep. 152, a note was given for liquor sold in violation of law, and was by statute void. Defendant knew its invalidity, transferred it by an indorsement without recourse, and he was held liable to his vendee.

In *Delaware Bank v. Jarvis*, 20 N. Y. 226, a usurious note was sold and the vendor was adjudged liable, not merely for the money received by him, but also the costs paid by his vendee in a suit against the makers of the note. In the opinion Mr. Justice Cox STOCK uses this language:

"The authorities state the doctrine in general terms that the vendor of a chose in action in the absence of express stipulation, impliedly warrants its legal soundness and validity. In peculiar circumstances and relations, the law may not impute to him an

engagement of this sort. But if there are exceptions, they certainly do not exist where the invalidity of the debt or security sold arises out of the vendor's own dealing with or relation to it. In this case, the defendant held a promissory note which was void, because he had himself taken it in violation of the statutes of usury. When he sold the note to the plaintiffs and received the cash therefor, by that very act he affirmed in judgment of law that the instrument was unattainted so far at least as he had been connected with its origin."

In *Young v. Cole*, 3 Bing. N. C. 724, certain bonds were sold as Guatemala bonds, which turned out afterward to be lacking the requisite seal, and the vendor, though ignorant of the defect and innocent of wrong, was compelled to refund the money. The thing in fact sold was not the thing supposed and intended to be sold.

In *Gompertz v. Bartlett*, 24 Eng. Law and Eq. 156, the plaintiff discounted for the defendant an unstamped bill, purporting on its face to have been a foreign bill, drawn at Sierra Leone and accepted in London, but which was in fact drawn in London. If actually a foreign bill, it required no stamp, and was valid; but being an inland bill, it required a stamp to make it a valid bill in a court of law. The acceptance was genuine, and the acceptor had previously paid similar bills. But the acceptor becoming bankrupt, the commissioner refused to allow it against his estate because not stamped. Thereupon plaintiff, who had sold the bill, and been compelled to take it up, brought his action to recover the price he had paid for it, and the action was sustained. Lord CAMPBELL, before whom the case had been tried, and who then held adversely to the plaintiff, said:

"I then thought that the rule *caveat emptor* applied; but after hearing the argument and the authorities cited, I think the action is maintainable, and upon this ground: That the article sold did not answer the description under which it was sold. If it had been a foreign bill, and there had been any secret defect, the risk would have been that of the purchaser; but here it must be taken that the bill was sold as and for that which it purported to be. On the face of the bill it purported to be drawn at Sierra Leone, and it was sold as answering the description of that which on its face it purported to be. That amounted to a warranty that it really was of that description."

In *Ticonic Bank v. Smiley*, 27 Me. 225, an overdue note was transferred with this indorsement: "Indorser not holden." Yet it

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was decided that the indorser was liable to his vendee for any payment made on the note before the transfer, or any set-off existing against it of which the note gave no indication and the vendor no information.

In *Snyder v. Reno*, 38 Iowa, 329, it was held that there is an implied warranty that there has been no material alteration in the paper since its execution. The court says: "We have no doubt that there is an implied warranty of the transferrer that there is no defect in the instrument, as well as that the signature of the maker is genuine." See, also, *Blethen v. Lovering*, 58 Me. 437; *Ogden v. Blydenburgh*, 1 Hilt. 182; *Fake v. Smith*, 2 Abb. App. 76; 2 Para. on Notes and Bills, ch. 2, § 2, and cases in notes; *Terry v. Bissell*, 26 Conn. 23; 1 Dan. on Neg. Inst., § 670.

In this, the author thus states the law: "When the indorsement is *without recourse*, the indorser specially declines to assume any responsibility as a party to the bill or note; but by the very act of transferring it, he engages that it is what it purports to be—the valid obligation of those whose names are upon it. He is like a drawer who draws without recourse, but who is nevertheless liable if he draws upon a fictitious party, or one without funds. And therefore, the holder may recover against the indorser *without recourse* (1), if any of the prior signatures were not genuine; or (2), if the note was invalid between the original parties, because of the want or illegality of the consideration; or (3), if any prior party was incompetent; or (4), the indorser was without title."

These authorities fully sustain the ruling of the district court. The note was not the legal obligation of the maker to the full amount. As to the usurious portion, it was as it were no note. This was a defect in the very inception of the note. It was known to the vendor and arose out of his own dealings in the matter. By all these authorities there is an implied warranty against such a defect, and the vendor is liable for a breach thereof.

The suggestion of counsel that the change in the usury law, by the legislation of 1872, affected the right of recovery upon the note has been already decided adversely, in the case of *Jenness v. Cutler*, 12 Kas. 500.

The judgment will be affirmed.

All the justices concurring.

ABBOTT V. COLEMAN.

(22 Kans. 250.)

Evidence — handwriting — expert testifying from recollection.

The genuineness of the signature to a lost instrument may be testified to by an expert who had examined the signature, and who testifies from his recollection of the signature as compared with genuine signatures in evidence.

ACTION on a promissory note. The opinion states the facts. The plaintiff had judgment below.

Biddle & Blue, for plaintiff in error.

Theo. Botkin, for defendant in error.

VALENTINE, J. This was an action on a promissory note, brought by E. P. Coleman against Robert Abbott. The defendant (who is now plaintiff in error) pleaded payments; and whether the note had actually been paid or not, was the only question in issue in the court below. The case was tried before the court and a jury, and on the trial it was shown that said note was executed December 14, 1870, by said Robert Abbott and Alexander Abbott to one David A. Mowery, to be due in one year, and was assigned by Mowery, on December 30, 1870, to the plaintiff, E. P. Coleman. In 1874, Robert and Alexander Abbott were partners in business. About March 20, 1874, Alexander Abbott handed to Robert a receipt dated March 14, 1874, signed "E. P. Coleman," and showing payment of said note. The body of the receipt was in the handwriting of Alexander Abbott, but in whose handwriting the signature was, was not shown for reasons hereafter to be stated. About December 5, 1874, Alexander died, and Robert retained possession of all the partnership papers. Among the papers he found said receipt. On June 6, 1876, this action was commenced; and about June 20, 1876, Robert took said receipt to Thomas L. Darlow, and showed it to him. Darlow was a lawyer, and Robert took the receipt to him for the purpose of consulting him in the case. Darlow examined the receipt and the signature thereto, and then returned the receipt to Robert. Darlow

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has never seen the receipt since. Robert then placed the receipt in his pocket-book, and afterward, on the 4th of July, 1876, lost both the pocket-book and the receipt, and has never seen or heard of them since. On September 9, 1876, depositions of E. P. Coleman were filed in the case, containing two of the genuine signatures of Coleman written therein. Both Robert and Darlow examined these signatures. The trial of this case was had August 4, 1877. Both Robert and Darlow testified as witnesses on the trial. All the foregoing facts were shown. It was also shown that Darlow had practiced law for about eight years; that he had had occasion in his practice to examine and compare signatures, and that he had been in the habit of examining and comparing them. Both Darlow and Robert again examined said signatures of E. P. Coleman on said depositions admitted to be Coleman's genuine signatures. The defendant then offered to prove, both by Robert and by Darlow, the contents of said receipt, and that the signature thereto was in the handwriting of E. P. Coleman, but the court refused to permit him to do so. Among other questions, the defendant propounded the following to Darlow, to wit: "You may state, if you are able, from your examination of the signature of 'E. P. Coleman' to those depositions, and from your recollection of the signature to that instrument (the receipt) which you examined at Mr. Abbott's request, whose signature was written to the said instrument." The record shows that this question was "objected to by plaintiff because the answer would be incompetent evidence," and the court below sustained the objection. In all the other cases except one, the objections were made because, as it was claimed, the evidence was "incompetent," and in that one the objection was made because, as it was claimed, the evidence was "incompetent, immaterial and irrelevant." The evidence in the case shows that the plaintiff's attorney, Theo. Botkin, once had a copy of said receipt, and that once in June, 1876, after Darlow had seen said receipt and returned it to Abbott, and before Abbott lost it, Botkin served a notice on Darlow, the defendant's attorney, "for an inspection and copy of papers connected with the suit," and that Darlow never afterward saw the receipt and therefore did not furnish it to Botkin. The plaintiff (defendant in error) says in his brief in this court that the testimony of Darlow concerning the signature to said receipt, "was objected to as incompetent and immaterial, and for the further reason that Darlow had not shown himself competent to testify con-

cerning Coleman's handwriting." Now the record does not show that any objection was made because "Darlow had not shown himself competent to testify concerning Coleman's handwriting." So far as the record shows, there was not a doubt concerning the qualifications and competency of Darlow as a witness. The doubt, or rather claim of incompetency, went to the evidence and not to the witness. The plaintiff objected to the evidence because he believed that the evidence was incompetent, not because he believed that the witness was incompetent. There was not an objection made or question asked that seemed to indicate that the plaintiff had even the slightest doubt as to the competency of the witness, and we think he was competent as an expert. The plaintiff really objected to the evidence because he believed that the genuineness of the signature to a lost instrument could not be proved in any case by any witness comparing his recollection of the signature on the lost instrument with admitted genuine signatures of the same person already in the case. Nor does there seem to have been any doubt concerning the loss of the receipt, and that it was lost without the fault of the defendant. No objection was made or question asked which would seem to indicate that the plaintiff had the slightest suspicion that the receipt might still be in existence, or within the reach of the defendant, or that the defendant intentionally lost it for the purpose of preventing an inspection of it by others. The defendant did not merely mislay the receipt. He did not merely place it somewhere and then forget where he placed it. Nor did he hand it to some other person who may still, perhaps, have it in his custody, but he *lost* it. He testified positively, absolutely and affirmatively that he lost it. He *knew* he lost it, and knew when he lost it. He also, at the same time, lost his pocket-book containing it. The defendant had no other evidence to prove the genuineness of the signature to said receipt, and no other evidence to prove payment of the note and therefore, the verdict and judgment were rendered in favor of the plaintiff and against the defendant for the amount of the note.

We think that the court below erred in excluding Darlow's testimony. Of course it was weak, but it was the best that the defendant could procure and should have been admitted for what it was worth. We have heretofore had occasion to examine the question relating to the comparison of handwritings, and we uphold the doctrine that comparisons of handwritings may be made both by experts and by the jury. *Macomber v. Scott*, 10 Kas. 335; *Joseph v. National*

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Bank, 17 id. 256. This case goes a little further and holds that an expert may compare a signature which he has previously seen, but which is now lost, with one which is admitted to be genuine and which is among the papers of the case. We have also had occasion to examine the question relating to the proof of the contents of lost instruments and we have decided nothing inconsistent with what we now decide. The only cases which might possibly be thought to be inconsistent are the cases of *Johnson v. Mathews*, 5 Kans. 118, and *Shepard v. Pratt*, 16 id. 209. But in these cases the question was squarely raised that the instrument was not lost. In this case the question was not squarely raised. In the first of said cases the instrument was not lost but only "mis-laid," and with any proper search might have been found. In the second of said cases the witness did not know that the instrument was lost but only supposed that it was, and did not make such a search as would convert his supposition or belief into knowledge; at least he did not show, by any statement of facts, that he made any such search. In the present case the witness *knew* that the instrument was lost. He knew the exact day on which it was lost, and nothing was said or done by the opposing party to indicate that he or his counsel entertained a doubt concerning its loss. If anything had been said or done by the opposing party to indicate a doubt as to whether the instrument was in fact lost or not, then it would have been proper for the court below to require strict proof of its loss by a detailed statement of the facts relating to the loss. Under the circumstances we think the loss was amply proved.

[Omitting a minor question.]

We think said evidence was competent, and therefore, the judgment of the court below will be reversed and cause remanded for a new trial.

All the justices concurring.

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KANSAS CENTRAL RAILWAY COMPANY v. ALLEN.

(22 Kana. 285.)

Eminent domain — rights acquired by railway companies in lands condemned for their use.

Under a condemnation of lands for railway purposes, the former owner of the soil still retains the fee, and the right to use the land for every purpose not incompatible with the use of it by the railway company for railway purposes; and therefore it is error to instruct a jury that he has no right to cross over or under the railroad.

PROCEEDINGS for appraisal of damages for right of way of a railroad company. The opinion states the case.

E. Stillings, and Keeler & Gephart, for plaintiff in error.

John S. Hopkins and Louis A. Myers, for defendant in error. A railway company may maintain trespass for all unlawful entries and acts upon the land taken by it for railroad purposes whenever such entries and acts interfere with the exclusive possession of such land. 32 Vt. 43. Driving a team upon or across the track or strip of land condemned, except at a public highway, would be a trespass, 42 Vt. 265. Stock straying upon the track or strip of land taken for railway purposes, where the same is not inclosed with a lawful fence, would be trespassing; but the railway company could not take any advantage of the fact of such trespass in an action brought to recover the value of the stock killed by the passing trains of the railway company. See cases before cited; also, 16 Kana. 573; 18 id. 462; 5 id. 167.

HORTON, Ch. J. The errors alleged are, that the court refused to allow the jury to be conducted to, and have a view of, the premises appropriated for the route of the railroad, and that the jury were misdirected in a material point of law.

[Omitting the first.]

The direction complained of is as follows:

“Now as to the right of the company and the plaintiff to the

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strip of land taken and appropriated by the company: After the strip of land is appropriated, the exclusive use of this strip vests in the company. No legal right or privilege to cross over or under it is reserved or left to the plaintiff. The company has a perfect right to fence up its road, except at public highways or public crossings. In this respect the right of the company differs materially from the rights of the public in land taken for a common highway. The railway company, the defendant, must, from the very nature of its operations, for the security of its trains, its passengers and its employees, and its free use of its road, have the right at all times to the exclusive occupancy of the land taken, and to exclude all concurrent occupancy by the plaintiff in any mode and for any purpose."

From the record it is shown that the plaintiff testified:

"That the farm was worth twenty dollars per acre before the construction of the railroad across it, and fifteen dollars per acre after its construction. He also testified that there were two drains crossed by the road on his land, one near the easterly entrance to the land, and one near the center of the land; that the railroad company had filled up the eastern one, and made a trestle-work over the one near the center; that the one near the center of the farm was deep enough below the railroad trestle-work for stock to pass under the road, by making a little expenditure, but that the railroad company had not prepared it for such purpose, nor given him any right of way under or over said road; that the road cut off a part of his farm from Elk creek, and left him without access to it for his stock from the main part of his farm; that he had crossed the road with his teams and hauled a part of his crop across it the present season, and stacked it on the south side of the railroad near the creek, and that the railroad company never gave him any right or privilege to cross the road under or over the road."

Other witnesses were called as to the damages, who gave their opinions — some of them much above that of the plaintiff, and some of them much below it; and upon the testimony so given, it became a question of importance, as affecting the damages to be assessed, whether, under the appropriation made, as shown by this proceeding, the railway company had the right to the exclusive possession of the right of way appropriated, and to prevent the owner of the farm from passing under or over the said railroad with his teams or his stock.

To decide the question involved, it becomes necessary to deter-

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• mine the nature and extent of the interest which railroad companies acquire in lands obtained by condemnation proceedings, under the law of 1868 and the amendments of 1870. Section 84, ch. 23, Laws of 1868, provides that the perpetual use of the land condemned shall vest in the railroad company to which it is appropriated for the use of the railroad. The law of 1864 provided that a title in fee simple might be acquired by railroad companies by virtue of their compulsory powers in taking land. Under the law of 1868, a mere easement only is granted; under the old law of 1864, an absolute title could be secured. Some reason must have existed in the minds of the law-makers for the change which has been made in the statute, and we have no right to extend by judicial construction an easement into an absolute title. There is a wide difference between the two. Under an absolute title in fee simple, the owner of the soil owns from the center of the earth up to the sky.

An easement merely gives to a railroad company a right of way in the land, that is, the right to use the land for its purposes. This includes the right to employ the land taken for the purposes of constructing, maintaining and operating a railroad thereon. Under this right the company has the free and perfect use of the surface of the land, so far as necessary for all its purposes, and the right to use as much above and below the surface as may be needed. This would include the right to tunnel the land, to cut embankments, to grade and make road-beds, to operate and maintain a railroad with one or more lines of track with proper stations, depots, turnouts and all other appurtenances of a railroad. The former proprietor of the soil still retains the fee of the land and his right to the land for every purpose not incompatible with the rights of the railroad company. Upon the discontinuance or abandonment of the right of way the entire and exclusive property and right of enjoyment revert in the proprietor of the soil. After the condemnation and payment of damages the soil and freehold belong to the owner of the land subject to the easement or incumbrance, and such land owner has the right to the use of the condemned property provided such use does not interfere with the use of the property for railroad purposes. In some cases the right of the owner of the soil would practically not amount to anything because the purposes of a railroad company might require the use of all the land taken to such a degree as to forbid the owner from any benefit whatever. The paramount right is with the railroad company, and the land owner can do nothing

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which will interfere with the safety of its road, appurtenances, trains, passengers or workmen.

With these views of the interest which railroad companies acquire in lands obtained by condemnation proceedings, it is evident that the court erred in instructing the jury that "no legal right or privilege to cross over or under [the railroad] is reserved or left to the plaintiff" (defendant in error). Under this instruction the land owner could not erect a suspension bridge over the road, or float in a balloon over it in the air, or even dig coal or mine minerals or quarry rock in the bowels of the earth beneath the road-bed. The law is otherwise. After the strip of land was appropriated to the plaintiff in error the perpetual use of the land vested in the railway company, its successors and assigns, for railroad purposes. The defendant in error had no legal right or privilege to cross over or under the road so as to interfere with the use of the property for those purposes. The company had a perfect right to fence up its road except at public highways or public crossings. In the use of the land the railroad company had the paramount right, but the defendant in error had also the right to the land for every purpose not incompatible with the rights of the road. If the railroad company required exclusive occupancy of the land taken for the use of its railroad on account of the nature of its operations, or for the security of its trains, its passengers or its employees, it was entitled to such occupancy. On the other hand, if the company had built its bridges and trestle-work so high in places as to allow the free passage of stock or teams under the road, and their entry and passage were of no detriment to the railroad, and in no way interfered with the use of the land for the purposes of the railroad, the defendant in error, as the land owner, had the right to enter upon such land and pass under such bridges or trestle-work with his teams and stock, without being a trespasser. He had also the right to widen the drain or passage under the trestle-work, if this in no way interfered with the rights of the railway company. The trial court followed the authority of *Jackson v. Railroad Company*, 25 Vt. 150, but that is an exceptional case. It goes too far. It transfers an easement into an absolute title. It announces, as a matter of law, that a railroad company has the right at all times to the exclusive occupancy of the land condemned for its purposes, and excludes all concurrent occupancy by the land owner in any mode or for any purposes. We are unwilling to approve that doctrine. It is our

opinion that it is a question of fact, not of law, whether the necessities of the railroad demand exclusive occupancy for its purposes, and what use of the property by the owner is a detriment to or interference with the rights of the road. Again, this authority is in conflict with the majority of cases, and if adopted as the law in this State, now so sparsely settled, and where in many of the frontier counties but a single track is necessary, and public highways and public crossings are at great distances from each other, would work severe hardship and injustice. *Blake v. Rich*, 34 N. H. 282; Wash. on Easements, 159, 214; *Lance's Appeal*, 55 Penn. St. 16; *Evans v. Haefner*, 29 Mo. 141; *Railroad Company v. Burkett*, 42 Ala. 83; 1 Red. on Railw. 247; *Railroad Company v. Kip*, 46 N. Y. 546; *Cemetery v. Railroad Company*, 68 id. 591.

The direction to the jury by the court below, inconsistent with this opinion, being erroneous the judgment is reversed and the cause remanded for new trial.

VALENTINE, J., concurring. BREWER, J., not sitting.

ABELES V. COCHRAN.

(23 Kana. 405.)

Corporation—purchase of stock by directors ultra vires—liability of directors.

Where one contracted to sell his stock in a State bank to the bank through the directors, the contract being *ultra vires* as to the bank the directors are not individually liable.

ACTION on contract. The opinion states the case. The defendants had judgment below.

W. W. Guthrie and *Lucien Baker*, for plaintiff in error. Although the bank did not have the right to buy plaintiff's stock, the plaintiff did have the right to sell such stock, and his attempted sale to the bank is not an illegal transaction which prevents his suing to recover against the persons negotiating such sale, and through whose hands the benefits of his stock in fact passed. *Tracy v. Talmage*, 14 N. Y. 162; *Weckler v. Bank*, 42 Md. 593-597; *S. C.*, 20 Am. Rep. 95; *Coleman v. Columbia Oil Co.*, 51 Penn. St. 74; *Kimmel v. Stoner*, 18 id. 155; *Reese v. Bank*, 31 id. 78; *Palmer v*

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Stephens, 1 Den. 472-481; *Lazarus v. Shearer*, 2 Ala. 719-725; *Rossiter v. Rossiter*, 8 Wend. 495; *Clark v. Foster*, 8 Vt. 98; *Roberts v. Button*, 14 id. 195-202; *Miller v. Stock*, 2 Bail. 163; *Meech v. Smith*, 7 Wend. 315, 319.

A. S. Everest, and *Clough & Wheat*, for defendants in error.

BREWER, J. Prior to August 23, 1873, plaintiff was the owner of a large amount of stock in the German Savings Bank of Leavenworth. On that day he made a sale of it and delivered the certificates thereof assigned in blank. The questions in this case are: To whom was such sale made, and are the defendants liable as purchasers or otherwise for the price of this stock? The district court sustained a demurrer to the evidence, and from this ruling the plaintiff brings error. The defendants were directors of the bank, and their claim is that the sale was made by plaintiff to the bank; and that whether that sale was a valid contract on the part of the bank or not, no personal liability was assumed by them. The plaintiff on the other hand contends, that the sale was made to the defendants personally; and also that if made to the bank, as such a purchase of its own stock without the consent of the stockholders was *ultra vires*, the directors who made the contract were bound, and not the bank. In other words, he insists that they in fact bought for themselves; and that if they attempted to buy for the bank, as the bank could not buy, they bound themselves instead of it. Involved in this are two questions — one of fact and the other of law. What, as a matter of fact, was the contract? Between what parties was it attempted to be executed, and what responsibilities did the defendants assume thereby?

Upon the first question there is little room to doubt. The transaction, as understood and intended by the parties at the time, was a sale to the bank. While the plaintiff in his direct testimony does not say so in so many words, yet he does not assert the contrary; and a paper is offered in evidence, signed by him, in which he recites the sale to the bank; and there is also offered the record of a suit brought by the bank to set aside certificates of deposit issued for this stock, in which suit the bank obtained judgment. It were idle to say, that at the time, the parties did not understand and intend a transaction between the bank and Mr. Abeles.

We pass, therefore, to the second question. The parties who represented the bank and made the purchase for it were the defend-

ants. They were its directors, yet as directors they had no power to bind the bank by a purchase of its stock, and the attempted sale was a nullity, and the bank properly recovered in an action to set aside the certificates of deposit issued on such attempted purchase. Now the contention is, that inasmuch as the defendants attempted to bind the bank and failed, they therefore bound themselves; that the case comes within the rule that an agent who acts without authority binds himself and not his principal. This rule, however, is not of universal application. There are exceptions to it, and this case comes within one of those exceptions. It will be noticed that the failure of the directors to bind the bank arose from a lack of power in them as directors and not from any failure to pass the proper resolution as a board, or to take any other prerequisite step. The law under which the corporation was organized gives no such power to directors. *German Savings Bank v. Wulfekuhler*, 19 Kas. 60. It is something the directors may not do. They cannot create the power. Their acts or omissions in no manner affect the question of its existence. And this want of power, growing out of the law, is a matter of law as open to the knowledge of the plaintiff as of the defendants. Further, there is no pretense of any false representations made by defendants, or of any concealment of facts; nothing to show any willful wrong on their part. Both parties, in fact, supposed the power existed in the directors to make the purchase contracted upon that basis, and contracted in good faith. The power did not exist and the bank repudiated the purchase, and the defendants can be held only upon the bare proposition that because the principal was not bound the agent must be. But this does not necessarily follow. It is familiar law that where there is an express contract the law will not imply one. In other words, when parties have definitely put their intentions into the shape of an express agreement the law accepts that agreement as the measure of their respective rights and will not attempt to infer the existence of some other agreement which the parties ought to have made. Here the contract, as made, was in the name of the bank and for the bank. That was the express agreement. Will the law imply another? Will not the contract actually made determine the rights of the respective parties?

Where there is no wrong imputable to the agent no action will lie against him; not on the contract, for the contract was not his, not for any wrong of act or omission, for he is guilty of none.

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In *Ogden v. Raymond*, 22 Conn. 384, in which, as here, was an attempt to hold an agent on a contract made for and in the name of his principal, the court says:

"If the form of the contract is such that the agent personally covenants and then adds his representative character, which he does not in truth sustain, his covenant remains personal and in force and binds him as an individual. But if the form of the contract is otherwise, and the language, when fairly interpreted, does not contain a personal undertaking or promise, he is not personally liable, for it is not his contract and the law will not force it upon him. He may be liable, it is true, for tortious conduct if he has knowingly or carelessly assumed to bind another without authority, or when making the contract has concealed the true state of his authority and falsely led others to repose in his authority; but as we have said, he is not, of course, liable on the contract itself, nor in any form of action whatever."

In *Aspinwall v. Torrance*, 1 Lans. 381, we find this language in the opinion: "In no case that I have been referred to, has the agent been held liable as the principal where the extent of the agency was as well known to the one party as the other."

In *Snow v. Ilbery*, 10 M. & W. 1, the facts were, that in the absence of her husband, and with his authority, the wife had been in the habit of purchasing meat from the plaintiff. The husband died while on his journey, and the wife, ignorant of the fact, continued her purchases in like manner. It was held that no action could be maintained against her upon these last purchases. The court says:

"On examination of the authorities, we are satisfied that all the cases in which the agent has been held personally responsible, will be found to arrange themselves under one or other of these three classes. In all of them it will be found that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated as true what he did not know to be true, omitting at the same time to give such information to the other contracting party as would enable him equally with himself to judge as to the authority under which he proposed to act." And again: "If, then, the true principle derivable from these cases is, that there must be some wrong or omission of right on the part of the agent in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present."

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In *Sanford v. McArthur*, 18 B. Mon. 411, it appeared that the directors of a bank ordered the issue of notes in excess of the authority given by the law of the bank's incorporation, and they were held not personally liable, and that a person dealing with the bank was bound to take knowledge of the powers granted by law to its agents. See, also, Story on Agency, § 265; *McCurdy v. Rogers*, 21 Wis. 197; *Rashdall v. Ford*, 2 L. R. Eq. Cas. 750; *Beattie v. Lord Ebury*, 7 L. R. Ch. App. 777.

The doctrine of these last two cases is, that a misrepresentation as to a matter of law is not such a one as will cast a personal liability on the agent, and that on the ground that each party is bound to know the law.

It is unnecessary to pursue this examination of authorities further. The doctrine is clear, that where the contract is made in the name of the principal, and without any personal covenant on the part of the agent, and without any wrong on his part, either in act, statement or omission, the latter is not responsible, even though the former be not bound.

The judgment will be affirmed.

VALENTINE, J., concurring. HORTON, C. J., not sitting.

EIKENBERRY V. TOWNSHIP OF BAZAAR.

(22 Kans. 556.)

Municipal corporation — liability of township for injury by defective highway.

In the absence of a statutory liability a town is not liable in a civil action for damages occasioned by a defect in a highway.*

ACTION against a town for personal injuries occasioned by the defective condition of a highway. The defendant had judgment below on demurrer.

S. P. Young and Sterry & Sedgwick, for plaintiff in error.

John V. Sanders, W. S. Romigh and S. N. Wood, for defendant in error.

* To same effect, *Askew v. Hale County* (54 Ala. 639), 25 Am. Rep. 730; *Braham v. Supervisor of Hinds County* (54 Miss. 363), 28 Am. Rep. 352.

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HORTON, Ch. J. The principal question presented is, whether a township in this State is liable for injuries caused by unsafe or defective highways? In the absence of an express statute imposing the liability, the authorities uniformly hold that organizations such as counties, townships, school districts, road districts and the like, though possessing corporate capacity and power to levy taxes and raise money, have been considered not to be liable for neglect of public duty. The theory of these various decisions is, in effect, that such organizations, though corporations, exist as such only for the purposes of the general political government of the State; that all the powers with which they are intrusted are the powers of the State, and all the duties with which they are charged are the duties of the State; that in the performance of governmental duties the sovereign power is not amenable to individuals, and therefore, these organizations are not liable at the common law for such neglect, and can only be made liable by statute. Cooley on Torts, 622; Dill. on Mun. Corp., vol. 2, 761, 763; *Town of Waltham v. Kemper*, 55 Ill. 346; S. C., 8 Am. Rep. 652; *Commrs. of Hamilton Co. v. Mighels*, 7 Ohio St. 109.

As our State has not adopted any statute expressly making townships liable for injuries on highways resulting from neglect of public duty, these organizations are not, under the authorities, liable in civil actions for neglect in that regard.

Counsel for plaintiff in error cite the decisions of this court that cities having power conferred upon them in reference to streets and sidewalks, which in some respects are similar to the powers granted townships, are liable for injuries resulting from failure to keep their streets and sidewalks in safe condition, and assert, that logically, the same doctrine should be applied to townships. Counsel fail to note the distinction between municipal corporations proper and *quasi* corporations. This distinction is pointed out and commented on in *Beach v. Leahy*, 11 Kas. 23. Cities, towns and villages are municipal corporations proper, while counties, townships, school districts and road districts are *quasi* corporations. The difference between these two classes of corporations is well established, and a principle applicable to the one class is not necessarily applicable to the other.

The order and judgment of the district court will therefore be affirmed.

All the justices concurring.

MOURIQUAND v. HART.

(22 Kans. 594.)

Exemption — homestead — grist-mill.

A public grist-mill, adjoining the owner's farm, but not enclosed with it, is not a part of the homestead for purposes of exemption.

INJUNCTION to restrain the sale of a homestead. The opinion states the facts. The plaintiff had judgment below.

Chas. J. Peckham and *R. H. Nichols*, for plaintiff in error.

Hill & Broadhead, for defendant in error.

BREWER, J. The petition in error and accompanying transcript in this case shows, that at the September term, 1876, of the district court of Chautauqua county, the plaintiff herein (Mouriquand) recovered a judgment for \$654 against the defendant Hart, in an action founded upon an alleged tort; that on or about January 10th, 1877, a general execution was issued out of said court to collect said judgment, directed and delivered to the sheriff of said county, who, on the same day, being unable to find goods and chattels of said Hart, and so indorsing on said execution, levied the same upon one and one hundred and twenty-nine one hundred and sixtieths acres of land situated in said county, and caused the same to be appraised and advertised for sale, to satisfy said judgment and costs; that said defendant Hart, prior to the first day of the term of court at which said judgment was rendered, and from that time until the said levy, was the owner of said land in fee simple absolute; that said one and one hundred and twenty-nine one hundred and sixtieths acres formed a portion of a tract of 112 acres (not within the corporate limits of any town or city), upon which Hart resided with his family during all the period aforesaid — he being the head of a family and entitled to the benefit of the homestead exemption laws of the State; that all of said 112-acre tract of land, except the one and one hundred and twenty-nine one hundred and sixtieths acres so levied upon as aforesaid, was farming land, and used by Hart for farming purposes; that the one and one hundred and twenty-nine one hundred

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and sixtieths acres so levied upon were, during all the period aforesaid, exclusively occupied and used as the site of a public grist-mill, such mill and its proper appurtenances being located and in operation thereon; that no farm buildings or other proper farm appurtenances were on said tract so levied upon, nor did Hart with his family actually reside thereon during said period, but they did reside upon another portion of said 112-acre tract.

After such levy, and prior to the day of sale, Hart filed in the district court aforesaid a petition for an injunction against said Moriquand and said sheriff, claiming said entire tract of 112 acres, and all improvements thereon, as his homestead, and exempt from sale upon execution; that the proceedings aforesaid were creating a cloud upon his title; and asking that such levy and intended sale, and all attempts to subject said land to the payment of said judgment be perpetually enjoined. A temporary injunction was allowed upon this petition, and the proceedings were stayed. Defendants in said cause, by duly verified answer, set up the foregoing state of facts, to which plaintiff demurred generally. At the March term, 1877, of the district court, said demurrer was sustained, and judgment rendered thereon, making said injunction perpetual, and against defendants for costs; to which Moriquand, defendant below, and plaintiff in this court, duly excepted. This cause is brought here to reverse said last-named order and judgment of the district court.

We think the petition in error must be sustained. We had occasion in the recent case of *Ashton v. Ingle*, 20 Kas. 670; *S. C.*, 27 Am. Rep. 197, to examine this question of exemption in relation to the use put upon and the manner of occupation of premises claimed to be exempt, and any extended discussion of the question will therefore be unnecessary in the present case. Counsel would distinguish this case from that, in the fact that in that case the portion of the premises held not exempt was leased to tenants, and that therefore the owner had no occupation and no right of occupation, having transferred away both, while in this the premises levied upon were in the actual occupation of the owner. Instead of leasing the mill to others he was running it himself. He therefore, in the language of the Constitution, both owned and occupied. There is, of course, a difference between the cases as there is a difference in the use to which the disputed premises were put, but this difference is not such as to remove this case out of the rule laid down in that. It was then conceded that there might be a con-

structive occupancy, and it had previously been held, in *Hixon v. George*, 18 Kas. 258, that the mere fact that premises are leased does not necessarily destroy the homestead exemption; but the idea, as expressed, was that the use was such as to disconnect that portion of the premises from the homestead. As said in the opinion: "In order that anything shall be a part of the homestead, it must not only be connected therewith as one piece of land is connected with another to which it adjoins, but it must also be used in connection therewith, as a part thereof. In legal phrase, it must be appurtenant thereto." So in the case at bar, the mill was not used in connection with, and as a part of, the homestead. If it had stood a mile away from the defendant's farm, and been used exactly as it was used, no one would for a moment think of calling it a part of the homestead. The fact that it is adjacent, and that the ground covered by it, together with the farm, does not exceed 160 acres, does not change the character of the use. "Homestead" and "residence" are the words of primary significance in that section of the Constitution granting and defining the exemption. Area is subordinate and a mere limitation. The exemption is not of so much ground upon which is a homestead, but a homestead to such an extent. It may be that a man may reside with his family in his store-building, or his brewery, or mill, and then hold the entire building exempt as his homestead; but this is no such case, and it will be time enough to pass upon such a question when it arises. Here, the defendant had his residence in a separate and independent building away from his mill, and that was his homestead. With it passed, as appurtenant thereto, his farm, but not his mill. The claim in the petition was, that the mill was exempt as a part of the farm, but this clearly cannot be. It was a public grist-mill. The running of it was an independent business, and not a part of the operation and management of the farm. Whether he could, if he had no farm, claim his mill as exempt, need not be decided. It would seem, from the leading case cited in counsel's brief, and in the opinion in *Ash-ton v. Ingle*, and in that of *Greeley v. Scott*, 2 Woods, 657, that such would be the decision under the Florida Constitution; but there is this difference between the language of the two Constitutions: That of Florida (art. 9, § 1) reads, "a homestead to the extent of 160 acres of land," etc.; ours, "a homestead to the extent of 160 acres of farming land," etc. Whether the word "farming" is to be considered a limitation to the actual use, so that only that portion of the adjacent

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100 acres which is actually used for farming purposes shall be exempt, or as simply descriptive of land outside the limits of a town or city, or as meaning land which is susceptible of cultivation and may be used for farming purposes, and has not already been put to other uses, is a question whose determination may become important in some cases, and would help in the solution of the inquiry just presented. We shall not stop to consider it now. All we now decide is, that the farmer may not hold as exempt his mill in addition to his farm.

The judgment of the district court will be reversed, and the case remanded with instructions to overrule the demurrer.

All the justices concurring.

KANSAS CENTRAL RAILWAY COMPANY v. FITZSIMMONS.

(23 Kans. 686.)

Negligence — infant injured while playing on railway turn-table — contributory negligence.

A boy, twelve years of age, was injured while playing on a railway turn-table, left unlocked and unguarded, in an open prairie, where persons frequently passed. *Held*, that the questions of negligence and contributory negligence were for the jury. (See note, p. 206.)

ACTION for personal injuries. The opinion states the facts. The plaintiff had judgment below.

E. Stillings, for plaintiff in error.

Lucien Baker, for defendant in error.

VALENTINE, J. This is the second time that this case has been to this court. (18 Kas. 34.) The first judgment rendered in the case (which judgment was in favor of Fitzsimmons, and against the railway company for \$3,000 and costs), was reversed by this court, and the cause remanded to the district court for further proceedings. On its return to the district court it was again tried; and this time it was tried in accordance with the expressed views of the Supreme Court stated in its opinion. This second trial resulted in a judg-

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ment in favor of Fitzsimmons, and against the railway company for \$500 and costs; and, considering that the plaintiff, Fitzsimmons, lost a leg and about four months' time in being cured, and suffered much, and paid \$100 doctor's bill, the amount of the judgment seems not to be excessive; provided, of course, that the railway company is liable for the plaintiff's injuries. But the railway company claims that it is not liable for such injuries; and it again brings the case to this court, and now asks that this second judgment shall also be reversed. The plaintiff's injuries were caused by the revolving of a turn-table, belonging to the defendant railway company; but the defendant claims that it is not liable for such injuries — (1) because it had nothing to do with the said turn-table, or with the operation of the railway to which the turn-table belonged; (2) because even if it had anything to do with said turn-table, still it was not guilty of any negligence in connection therewith; and (3) because the plaintiff was himself guilty of contributory negligence. The questions, however, whether the defendant had anything to do with said turn-table, whether the defendant was guilty of negligence, and whether the plaintiff was guilty of contributory negligence, were, upon the evidence introduced in this case, all questions of fact, which were properly submitted to the jury, and upon which the jury found against the defendant, and the verdict of the jury was sustained by the court below. There was evidence introduced tending to prove each side of these questions. This would seem to be an end of the controversy, as this court cannot ordinarily review the findings of the court below, or the verdict of the jury upon mere questions of fact. But we shall briefly review the facts, as the plaintiff in error (defendant below) seems to think that there is a question of law somewhere lurking in the case, which may possibly be reviewed by this court. The facts of the case are pretty fully stated in 18 Kas. pp. 35, 36, but we shall have occasion to restate some of them, and to state others, in our discussion of the case.

[Omitting the first question.]

II. Was the railway company negligent? This question was also fairly submitted to the jury, and the jury found against the defendant. It would seem from the evidence that the turn-table was a dangerous machine for boys to use, and yet that it was easily moved by boys, easily turned or revolved upon its axis, and that it was of that alluring character which would naturally invite boys to use it and to play upon it. It was situated within less than half a mile

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from Leavenworth, a populous city, in an open prairie, where the cattle of citizens roamed and grazed, where persons frequently passed and repassed, and where boys often played, and yet it was left without locks or fastenings, and without being watched or guarded, or even fenced in. That it would naturally attract boys and induce them to ride upon it, all men ought to know. Everybody knows that by nature and by instinct boys love to ride, and love to move by other means than their own locomotion. They will cling to the hind ends of moving wagons, ride upon swings and swinging gates, slide upon cellar doors and the rails of stair-cases, pull sleds up hill in order to ride down upon them on the snow, and even pay to ride upon imitation horses and imitation chariots swung around in a circle by means of steam or horse power. This last is very much like riding around in a circle upon a turn-table. Now, everybody knowing the nature and the instincts common to all boys, must act accordingly. No person has a right to leave, even on his own land, dangerous machinery calculated to attract and entice boys to it, there to be injured, unless he first take proper steps to guard against all danger; and any person who thus does leave dangerous machinery exposed, without first providing against all danger, is guilty of negligence. It is a violation of that beneficent maxim *sic utere tuo et alienum non lœdas*. It is true that the boys in such cases are technically trespassers. But even trespassers have rights which cannot be ignored, as numerous cases which we might cite would show. But see particularly the cases of *Railroad Co. v. Stout*, 17 Wall. 657, and *Keffe v. M. and St. P. Rly. Co.*, 21 Minn. 207; *S. C.*, 18 Am. Rep. 393, which are turn-table cases.

III. Was the plaintiff guilty of contributory negligence? This question was also fairly submitted to the jury, and they found against the defendant and in favor of the plaintiff. The plaintiff was a boy a little over twelve years old, and from his own testimony, we should think was not a very bright boy, even for that age. He was born in Ireland, and his father was a common day laborer. On the day on which the accident occurred, the boy went to hunt his father's cow, and found her near the turn-table. He then, with other boys about his own age, went to the turn-table. He had never before seen one. He had previously been warned to stay away from the railroad, and from the cars, but had never been warned from the turn-table. There is some conflict in the evidence as to how he got on the turn-table, and in what position he was, when thereon, and

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when the accident occurred, whether sitting, standing or otherwise, and whether he was told by any one of the boys not to get on at the time he did so; but we must presume that the jury believed such only of the conflicting evidence as was most favorable to the plaintiff. Now, take this boy, at his premature age, with his limited knowledge and experience, and his lowly station in life, and probably it was intense amusement, almost irresistible, for him to ride upon a turn-table; and probably he did not imagine that he was a trespasser, or in the slightest danger. That plaintiff may recover under such circumstances, see *Railroad Co. v. Stout*, and *Keffe v. M. and St. P. Rly. Co.*, *supra*, and the authorities therein cited. Much of what we have said while discussing the defendant's negligence will apply here. Boys can seldom be said to be negligent when they merely follow the irresistible impulses of their own natures—instincts common to all boys. In many cases where men, or boys approaching manhood, would be held to be negligent, younger boys, and boys with less intelligence would not be. And the question of negligence is, in nearly all cases, one of fact for the jury, whether the person charged with negligence is of full age or not.

We perceive no error in the rulings of the court below, and therefore the judgment will be affirmed.

HORTON, C. J., concurring. BREWER, J., not sitting in the case.

NOTE BY THE REPORTER. — To same effect as this decision is *Keffe v. M. and St. P. Ry. Co.*, 21 Minn. 207; *S. C.*, 18 Am. Rep. 893; but *contra*: *St. Louis, etc., R. Co. v. Bell*, 81 Ill. 76; *S. C.*, 25 Am. Rep. 269. See, also, *Kerr v. Forgue*, 54 Ill. 482; *S. C.*, 5 Am. Rep. 146.

Of the cases of *Railroad Co. v. Stout*, and *Keffe v. M. and St. P. Ry. Co.*, cited in the principal case, the New York Court of Appeals remarks *obiter*, in *McAlpin v. Powell*, 70 N. Y. 126; *S. C.*, 26 Am. Rep. 561: "We are not now called to express an opinion as to the soundness of these decisions in such a case; and while we are not prepared to uphold them, it is enough to say that the facts are by no means analogous." See, also, note to that case, 26 Am. Rep. 562.

The case of *Wood v. Independent School District of Mitchell*, 44 Iowa, 27, involves the question of negligence amounting to nuisance. There, a party who had contracted with the defendant for drilling a well in the school-house grounds, left his drilling machine unlocked and unguarded, and in his absence one of the school children was injured while playing with it. It was held, in an action by the child, that the danger arose not from the character of the work but from the machinery used, and accordingly the defendant was not liable for the negligence of its contractor; and also, that the machinery, although dangerous when thus left unguarded, was not a nuisance, being properly stationed for a legitimate purpose. After disposing of the first point, the court said:

"This brings us to consider the only remaining ground upon which appellant claims that the district is liable, and that is, that the district owned, occupied and controlled the ground upon which said Pratt & Moses had introduced the machinery, and the said district suffered it to remain there in its dangerous condition. In other words it is claimed that the district suffered a nuisance to remain upon its ground, and that the injury sued for resulted therefrom.

"In *Church of Ascension v. Buckhart*, 8 Hill, 193, the walls of a church edifice belonging to the plaintiff in error, were negligently permitted to stand after the rest of the building had been destroyed by fire, and a part of the wall afterwards fell upon a person while passing

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along the street. It was held that the corporation was liable to respond in damages for the injury. This case is relied upon by the appellant, but to our mind there is a substantial difference between it and the case at bar. The machinery was necessary for the prosecution of the work. It is not claimed that it was made unnecessarily dangerous in its construction or that it was more dangerous than many other pieces of machinery, or tools or implements, when meddled with by children. We are not prepared to hold that every person having upon his premises machinery, tools or implements which would be dangerous playthings for children, and in their nature affording special temptations to children to play with them, is under obligation to guard them in order to protect himself from liability for injuries to children received while playing with them, although the children were rightfully on his premises. It would be improper to burden the mechanical industries of the country by such a rule. Without holding, therefore, that there may not be pieces of machinery so peculiarly dangerous, that a right of action would exist at common law for injuries received from them if left unguarded, we do not think the drilling machine in question is such machinery; at all events we cannot regard it as so peculiarly dangerous that an employer should be made liable for the negligence, if any, of a contractor in leaving the machinery unguarded, the same being in use upon the employer's premises in the prosecution of a lawful work.

"The appellant claims that there was a public duty resting upon the district, and that its liability arises out of that fact. When, however, it is conceded that the children were rightfully upon the premises, the appellant can properly claim nothing more as a ground of the district's duty. It cannot be greater than that of a person maintaining a private school under circumstances similar in other respects."

Another turn-table case is *Koons v. St. Louis and Iron Mountain R. R. Co.*, 65 Mo. 592. There the child was killed, and the action was brought by his parents. An instruction to the jury to find for plaintiffs, if they "believe from the evidence that plaintiffs negligently permitted their son to wander from his home and to go upon the turn-table of defendant, and that the son was killed by said turn-table, and that he was so young and inexperienced as not to possess sufficient judgment to warn him of the danger of the place or character of the machinery, and that he was killed by negligence and carelessness of defendant in not properly guarding and protecting said turn-table and keeping children from playing on the same," was held to be clearly erroneous; but it was also held that the court would not, because of said instruction, reverse the judgment where there was no evidence whatever that plaintiffs ever assented to or approved of their child going on the turn-table, but on the contrary, they prohibited his so doing. The court said: "This instruction seems to have been based upon certain remarks of Mr. Justice HUNT in the case of *Railroad v. Stout*, 17 Wall. 657, where the boy injured, who was six years old, was the plaintiff, and the defense disclaimed any defense resting on the ground that plaintiff's parents were negligent, or that the plaintiff was negligent as he was only six years old. But in the present case the boy was killed and his father and mother are the plaintiffs. To say that if they negligently allowed their son to go and play on the turn-table it would be no contributory negligence would be going further than the decided cases, either here or elsewhere, authorize. It would be equivalent to saying that if they sent their boy, and encouraged him to resort to this machine as a play ground, they would still be entitled to recover, notwithstanding their negligence, because the machine was, through the negligence of the railroad company, left so that it could be used by children for such purposes; and thus the plaintiffs would be allowed to recover for their own negligence, without which the accident could not have happened. In the case of the *Railroad v. Stout* the child was not killed but crippled, and he was the plaintiff and not his parents, and it was conceded that there was no negligence on the part of the parents, and that as the child was only six years none could be predicated of the child, and therefore, the only question was as to the liability of the company by reason of their leaving the turn-table unlocked. The cases are materially different in this respect, and it is strange that the third instruction was asked and given, especially in view of the testimony which had no tendency whatever to establish any such negligence on the part of the plaintiffs. There was not a particle of evidence that the father permitted his son to go on this turn-table. The only testimony on the subject was the evidence of the father, and he stated that he warned and ordered an older brother of the boy killed not to go on this turn-table in the presence of the younger boy who was killed, and of course, such advice or direction was equivalent to a prohibition to the younger son."

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The principal case finds support in *Hydraulic Works Co. v. Orr*, 83 Penn. St. 332. The action was brought by the parents of the child who was killed and who was six years old. The facts appear in the opinion which is as follows:

"It is true that where no duty is owed no liability arises. If therefore, one leaves a stick of timber standing upright against his wall or an open pit in his private yard to which others have not access and a person strays in without invitation, or comes in without right, and pulls down the timber upon himself or falls into the pit, he can have no action against the owner of the yard for the alleged negligence. He had no business there and the owner owed him no duty. But it has been often said duties arise out of circumstances. Hence, where the owner has reason to apprehend danger owing to the peculiar situation of his property and its openness to accident the rule will vary. The question then becomes one for a jury to be determined upon all its facts of the probability of danger and the grossness of the act of imputed negligence. Such was the nature of this case. This building was a factory in which several kinds of business were carried on in different stories requiring the use of a hoisting apparatus above and an inclined plane below for the easy carriage of heavy articles, machinery, etc., into and out of the factory. These appliances were approached by means of a private opening or cartway shut in by a gate, which their use required to be often opened for the ingress of wagons and hands engaged in the business. The gate and passageway opened out upon a public and much frequented street where persons were passing and children playing. Unlike an ordinary private alley this passage was often open, and therefore, liable to the incursions of children, and even grown persons, from thoughtlessness, accident or curiosity. Now, the inclined way which did the injury was a dangerous trap. It was a heavy platform weighing eight or nine hundred pounds, attached by hinges within eighteen or twenty inches of the wall, and when lowered it fell across the cartway. When not lowered it stood upright against the wall, leaning so little beyond the center of gravity that a jar or a slight pull would cause it to fall forward. Its fall, in this instance, caught four children beneath it, one had his back broken, another his hands mashed and two escaped under the cavity. It was held up by no hook or other fastening but merely rested by its own slight weight beyond the equipoise, ready, therefore, to catch children like mice beneath a deadfall. When wagons passed it was often held up by hand, and a witness saw it fall against the wheels. Now, can it be righteously said that the owner of such a dangerous trap held by no fastening, so liable to drop, so near a public thoroughfare, so often open and exposed to the entries of persons on business, by accident or from curiosity, owes no duty to those who will be probably there? The common feeling of mankind, as well as the maxim *utere tuo, ut alienum non ledas*, must say this cannot be true, that this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect that one day or other some one, probably a thoughtless boy, in the buoyancy of play, would be led there, and injury would follow—especially, too, when prompted by knowledge that a fastening was needed. Perhaps the best monitor in such a case is the conscience of one who feels, in his dreadful recollection, the crushing sense that he had left such an engine of ill to take the life of an innocent child. Such, too, is the humanity of the law, that one may not justifiably, or even excusably, place a dangerous pit-fall, a wolf-trap or a spring-gun, purposely to catch and injure even willful trespassers poaching upon his grounds. The common feeling of mankind, guided by the second branch of the great law of love, and the common sense of jurors, must be left, in such a case, to pronounce upon the facts. We see no error, therefore, in submitting this case, on its facts, to the verdict of a jury. The verdict, when approved by the court, must be permitted to stand; for we take it no judge who sees manifest injustice done by the verdict will permit it to stand. An upright judge does his duty quite as well when he strikes down a false and unjust verdict, as when he approves of that which he cannot condemn."

PAXSON, J., dissented.

In some respects the case of *Lane v. Atlantic Works*, 107 Mass. 104, resembles the principal case, although the accident was in a public street. There was an ordinance prohibiting the standing of trucks in any street more than five minutes at a time without a proper person to take care of them, or more than twenty minutes at a time in any case. The defendant, an iron-founder, between 3 and 4 o'clock in the afternoon, put in the street in front of his foundry, where he knew that children were accustomed to play, a truck, with a hot iron casting.

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weighing 900 pounds upon it, with the intention of leaving it there over night. Three hours later, two children, one of them seven years and three months old, and the other eight years old, were passing along the street on their way home, when a third boy, J. S., twelve years old, not in their company, called to them to come over and see him move the truck. They stopped to see him; and within half a minute afterwards, upon his moving the tongue of the truck slightly, the casting rolled off and fell on the younger boy and injured him. The casting was not rigged upon the truck, and was of such a shape as to roll off easily. The wheels of the truck were not rigged; and when it was put in the street its tongue was so placed that a slight movement of it was sufficient to displace the casting. When the two boys stopped, they stood at first between the truck and the foundry, which adjoined the street; and it was by the direction of his companion that the one who was injured left that position and went into the carriageway on the other side of the truck, where the casting fell on him. *Held*, in an action by this boy for his injury, that the questions of the plaintiff's care and the defendant's negligence were for the jury; as also the question whether the plaintiff participated in the wrongful conduct of the boy who moved the truck; and that if the defendant was negligent in leaving the truck in the street, or leaving it insecure, and the occurrence by which the injury was received was one which might have reasonably been apprehended as the result of such negligence, and in fact the result thereof, and the plaintiff used due care, the wrongful conduct of the boy who moved the truck would not relieve the defendant from liability, although it contributed to the result. On an appeal after a second trial in this case (111 Mass. 186), the defendants requested a ruling that if the plaintiff joined with J. S. in the common object of meddling with the truck, crossed the street on his invitation for that purpose, and stood by to encourage and aid him, although he did not take hold of the truck, he was a participator with J. S. The judge, after reading the request to the jury, ruled that if the plaintiff took an active participation in the acts of J. S., or went there as a joint actor, for the purpose of encouraging him, he could not recover; but if he went there attracted by curiosity only, at the invitation of J. S., he could recover, if he was in the exercise of due care. *Held*, that the defendants had no ground of exception; and that in an action to recover for injuries caused by the defendants' negligence, to which the fault of another person contributed, the defendants' liability is not affected by the fact that the fault of such person was not negligence, but voluntary wrong-doing, if it was conduct which they should have apprehended and provided against.

In *Mullens v. Spencer*, 15 Abb. Pr. [N. S.] 819, the defendant had in his coal yard an elevator worked by steam, close to the line of the sidewalk, and during the intermission of work, the sliding door by which it was commonly shut off from the street, was left open, and in the absence of any person to guard it, a child, four years and a-half old, approached it, and was caught and crushed by the descending car. *Held*, that it was improper to non-suit on these facts, but the question of negligence should have been submitted to the jury. This was an action by the administrator in the Brooklyn City Court. The court said: "Upon authority and principle it seems to me it might well have left to the jury whether this elevator, so situated, was not a dangerous machine, when left unguarded and in motion, and whether the defendant should not have anticipated just such a casualty as did occur, unless some precaution was made use of to insure safety." "It would have been quite easy when no coal was being delivered, to close the sliding door, and thus prevent children from coming into dangerous proximity to the machinery; or at least it would seem to require some satisfactory explanation of the fact that while the car was in motion, so close to the sidewalk, and with no barrier between, there was no person about to guard against accidents."

In *Birge v. Gardiner*, 19 Conn. 507, the defendant had set up a gate on his own land, by the side of a lane through which the plaintiff, a child between six and seven years of age, with other children, was accustomed to pass between his residence and the highway. In passing along the lane he put his hand on the gate and shook it, causing it to fall on him and break his leg. A verdict for the plaintiff was sustained. The court said: "The plaintiff was a child, without judgment or discretion, and it was submitted to the jury to say whether such a child ought to be chargeable with fault, so as to defeat his recovery, or whether the acts done by him were not rather the result of childish instinct, which the defendant might easily have foreseen. It might, perhaps, have been going too far for the court to have said, as a matter of law, that a child of this age could not be so blameworthy as to excuse the defendant. We will not say that such cases may not be imagined, or may not sometimes occur. But it was favorable to the

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defendant, and he cannot complain of it, that the age and condition of the plaintiff, connected with the circumstances of the case, were put to the jury, for them to determine what degree of fault, if any, was imputable to the defendant. It cannot be claimed that the law would require the same acts of caution and prudence in a child as in a man."

In *Whirley v. Whiteman*, 1 Head. 610, the defendant owned a paper-mill, the machinery of which was propelled by steam. There was a shaft proceeding from the engine-house and extending through the wall of the mill-house. On the end of this shaft, some eight or ten inches outside of the wall, was fixed a cog wheel geared into another cog wheel. The wheels revolved from ten to twenty inches from the ground. They were about twenty feet from the street, in an open space, entirely exposed, without any cover, guard or enclosure. The wheels were generally in motion. Plaintiff and other children were in the habit of playing about the mill. The plaintiff was about three years old, and lived with his mother, across the street and nearly opposite the mill. One day when the engineer and other hands were absent at dinner, leaving the wheels running, the plaintiff was caught by the wheels and injured. The wheels might easily have been boxed or enclosed, so as to have avoided the danger of injury to any one. The jury found for the defendant, and the court set aside the verdict as contrary to evidence, saying: "We feel clear, from the facts proved in this record, that the defendants were guilty of negligence, perhaps it might be said, gross negligence, in leaving machinery so exposed as that by possibility it might be the cause of injury to others." "In playing about the cog wheels, the plaintiff was but indulging the natural instinct of a child, in yielding to the temptation into which he was led by the negligence of the defendant." After reviewing cases: "These cases rest upon the principle that the law imposes restrictions upon every one, as well in the use and enjoyment of his property, as in his personal actions and conduct, and that though a man may do a lawful thing, yet if any damage thereby befall another, he should be answerable if he might have avoided it."

In *Central Branch, etc., R. Co. v. Henigh*, Supreme Court of Kansas, February, 1880, where a railroad company constructs a certain switch-track 667 feet in length on its own land near a small village, making the grade of 280 feet thereof at the rate of eighty feet to the mile, and afterwards for several years operates its railroad and switch-track, and then in accordance with its usual custom places a flat car on said switch-track and grade and properly fastens the same with an ordinary hand brake, and on the next day a small boy, four years eight months and a few days old, goes to said car, without any right or authority so to do, and without the knowledge or consent of the railroad company, and not accompanied by any person, and climbing upon said car and unfastening the brake, and the car then by its own weight moves down said grade, and the boy either jumps off or falls off in front of said car and is run over by the car and killed; *held*, that the company is not guilty of any culpable negligence toward said boy, nor liable for damages on account of his death. The court said: "Now what duty did the railroad company owe to Charles W. Henigh which it did not properly perform? No relation existed between them. He was not a passenger, nor an employee, and had no business with the railroad company of any kind or character. He had no right to climb upon said car as he did, nor to touch it, nor even to go upon the company's premises. Technically he was a mere trespasser, and the company owed him no duty except such as it owes to trespassers in general, or such as it owes to all mankind. We have heretofore held that all persons must use their property and conduct their affairs with reference to the rights of all other persons and with reference to all known or anticipated surroundings, and that even trespassers have a right to expect that such will be done. *Kansas, etc., R. Co. v. Fitzsimmons*, 22 Kans. 626, 690; *Kansas, etc., R. Co. v. Brady*, 17 Kans. 380, 384. And we still adhere to this doctrine. But no person is bound to anticipate something which is not likely to occur, or to so conduct his affairs as to prevent accidents which are not likely to ever happen. This has reference where no specific duty exists, but only such general duties as all mankind owe to each other. Then, in the light of the foregoing, wherein was the railroad company negligent as towards Charles W. Henigh? The jury and the defendant in error say that it was in constructing said steep grade, and in not fastening said railroad cars so that they could not be unfastened by boys. But what specific right had Charles W. Henigh to say how said switch should be constructed or how said cars should be fastened? None at all. He had only that general right in the company's affairs which all mankind possess in the affairs of others. And that is, that the railroad company should so construct their road and so fasten their cars that no injury would be likely to occur to such persons as

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were likely to be in that vicinity. The accident that actually occurred could not have been anticipated. The cars were so well fastened that no danger was possible unless some person climbed upon them and unfastened the brakes; and then danger was almost impossible to any ordinary person. The cars were not dangerous machines left exposed near a populous city. Nor were they of that alluring character to entice boys to play upon them; for when unfastened they would move only a few feet and then stop. Nor were they dangerous even when moving to ordinary boys. Certainly boys from ten to sixteen years of age were not likely to be hurt by them. No one would have anticipated that a boy less than five years of age would have gone to the cars unaccompanied by any older person and have climbed upon one of them and loosened the brake, so as to set the car in motion. No such a thing ever occurred before. And certainly no one could have anticipated that a boy big enough to do that would have fallen off or jumped off in front of the car so that the car would have run over and killed him. The most of boys would have staid on the car so as to get a ride. And this the company had a right to expect. We do not think that the company was negligent."

The latest expression of the English courts touching this topic is *Clark v. Chambers*, L. R., 3 Q. B. Div. 337, which is also reported in full, 17 Alb. L. J. 504, and which reviews the principal English cases. The opinion is therefore valuable, although the intervention of a third person producing the injury was in question, as in *Lane v. Atlantic Works*, *supra*, and there was no question of infancy. The defendant had placed in a private road adjoining his ground a hurdle with a *cheveux de frise* on the top in order to prevent the public from looking over the barrier at athletic sports in his ground. Some one, not known, removed the hurdle to another spot without the defendant's authority, and the plaintiff, passing of right along the road soon afterward in the dark, and knowing the original position of the hurdle but not that it was moved, ran his eye against the *cheveux de frise* and lost his sight. The jury, in an action for negligence, held that the defendant's original erection of this hurdle was unauthorized and wrongful; that the *cheveux de frise* was dangerous to the safety of persons using the road, and that there was no contributory negligence. They gave the plaintiff a substantial verdict. *Held*, that the plaintiff's injury was not an improbable consequence of the defendant's act; that it was the defendant's duty to take all necessary precautions, under the circumstances, to protect persons exercising their right of way, and that the action was maintainable. COCKBURN, Ch. J., in delivering judgment, said: "The ground of defense in point of law taken at the trial and on the argument on the rule was, that although if the injury had resulted from the use of the *cheveux de frise* hurdle, as placed by the defendant on the road, the defendant, on the facts as admitted or as found by the jury, might have been liable, yet as the immediate cause of the accident was not the act of the defendant but that of the person, whoever he may have been, who removed the spiked hurdle from where the defendant had fixed it and placed it across the footway, the defendant could not be held liable for an injury resulting from the act of another. On the part of the plaintiff it was contended that as the act of the defendant in placing a dangerous instrument on the road had been the primary cause of the evil by affording the occasion for its being removed and placed on the footpath and so causing the injury to the plaintiff, he was responsible in law for the consequences. Numerous authorities were cited in support of this position." The court then review *Scott v. Shepherd*, 3 Wils. 403; 2 W. Bl. 892, the "squib" case; *Dixon v. Bell*, 5 M. & S. 198, the loaded gun case; *Holt v. Wilkes*, 3 B. & A. 304, the spring-gun case; *Jordin v. Crump*, 8 M. & W. 782, the dog spear case, and continue: "In *Mudge v. Goodwin*, 5 C. & P. 190, the defendant's cart and horse were left standing in the street without any one to attend to them. A person passing by whipped the horse which caused it to back the cart against the plaintiff's window. It was urged that the man who whipped the horse, and not the defendant, was liable. It was also contended that the bad management of the plaintiff's shopman had contributed to the accident. But TINDAL, Ch. J., said that even if this were believed it would not avail as a defense. 'If,' he says, 'a man chooses to leave a cart standing in the street he must take the risk of any mischief that may be done.' *Lynch v. Nurdin*, 1 Q. B. 59, is a still more striking case. There, as in the former case, the defendant's cart and horse had been left standing unattended in the street. The plaintiff, a child of seven years of age playing in the street with other boys, was getting into the cart when another boy made the horse move on. The plaintiff was thrown down and the wheel of the cart went over his leg and fractured it. A considered judgment was delivered by Lord DENMAN. He says: 'It is urged that the mischief was not produced by the mere negligence of the servant

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as asserted in the declaration, but at most, by that negligence in combination with two other active causes — the advance of the horse in consequence of his being excited by the other boy, and the plaintiff's improper conduct in mounting the cart, and so committing a trespass on the defendant's chattel. On the former of these two causes no great stress was laid, and I do not apprehend that it can be necessary to dwell on it at any length, for if I am guilty of negligence in leaving anything dangerous where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first.' And then, by way of illustration, the chief justice puts the case of a gamekeeper leaving a loaded gun against the wall of playground where school-boys were at play and one of the boys in play letting it off and wounding another. 'I think it will not be doubted,' says Lord DENMAN, 'that the gamekeeper must answer in damages to the wounded party. This,' he adds, 'might possibly be assumed as clear in principle, but there is also the authority of the present chief justice of the Common Pleas in its support in *Hedge v. Goodwin*.' It is unnecessary to follow the judgment in the consideration of the second part of the case, namely, whether the plaintiff, having contributed to the accident by getting into the cart, was prevented from recovering in the action, as no such question arises here. In *Daniels v. Potter*, 4 C. & P. 262, the defendants had a cellar opening to the street. The flap of the cellar had been set back while defendant's men were lowering coals into it, as the plaintiff contended, without proper care having been taken to secure it. The flap fell and injured the plaintiff. The defendant maintained that the flap had been properly fastened, but also set up a defense that its fall had been caused by some children playing with it. But the only question left to the jury by TINDAL, Ch. J., was whether the defendant's men had used reasonable care to secure the flap. His direction implies that in that case only would the intervention of a third party causing the injury be a defense. The cases of *Hughes v. Macle* and *Abbott v. Macle*, 2 H. & C. 744, two actions arising out of the same circumstances and tried in the Passage Court at Liverpool, though at variance with some of the foregoing so far as relates to the effect of the plaintiff's right to recover where his own act as a trespasser has contributed to the injury of which he complains, is in accordance with them as respects the defendant's liability for his own act where that is the primary cause, though the act of another may have led to the immediate result. The defendants had a cellar opening to the street. Their men had taken up the flap of the cellar for the purpose of lowering casks into it, and having reared it against the wall nearly upright with its lower face, on which there were cross-bars towards the street, had gone away. The plaintiff in one of the actions, a child of five years old, got upon the cross-bars of the flap and in jumping off them brought down the flap on himself and another child (the plaintiff in the other action) and both were injured. It was held that while the plaintiff whose act had caused the flap to fall could not recover, the other plaintiff who had been injured could, provided he had not been playing with the other so far as to be a joint actor with him. *Bird v. Holbrook*, 4 Bing. 628, is another striking case, as there the plaintiff was undoubtedly a trespasser. The defendant being the owner of a garden which was at some distance from his dwelling-house, and which was subject to depredations, had set in it without notice a spring-gun for the protection of his property. The plaintiff, who was not aware that a spring-gun was set in the garden, in order to catch a pen-fowl, the property of a neighbor, which had escaped into the garden, got over the wall, and his foot coming, in his pursuit of the bird, into contact with the wire which communicated with the gun, the latter went off and injured him. It was held, though his own act had been the immediate cause of the gun going off, yet that the unlawful act of the defendant in setting it, rendered the latter liable for the consequences. In the course of the discussion a similar case of *Jay v. Whitfield* was mentioned, tried before RICHARDS, Ch. B., in which a plaintiff, who had trespassed upon premises in order to cut a stick, and had been similarly injured, had recovered substantial damages, and no attempt had been made to disturb the verdict." The court then reviews *Harrison v. Great Northern Railway Co.*, 2 H. & C. 231, and concludes as follows: "We acquiesce in the doctrine thus laid down as applicable to the circumstances of the particular case; but we doubt its applicability to the present, which appears to us to come within the principle of *Scott v. Shepherd*, *Dixon v. Bell*, and other cases to which we have referred. At the same time it appears to us that the case before us will stand the test that said to be the true one. For a man who unlawfully places an obstruction across either a public or

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private way may anticipate the removal of the obstruction by some one entitled to use the way as a thing likely to happen; and if this should be done, the probability is that the obstruction so removed will, instead of being carried away altogether, be placed somewhere near; thus, if the obstruction be to the carriage-way, it will very likely be placed, as was the case here, on the footpath. If the obstruction be a dangerous one, wheresoever placed, it may, as was also the case here, become a source of danger from which, should injury to an innocent party occur, the original author of the mischief should be held responsible. Moreover, we are of opinion that if a person places a dangerous obstruction in a highway or in a private road, over which persons have a right of way, he is bound to take all necessary precautions to protect persons exercising their right of way, and that if he neglects to do so he is liable for the consequences. It is unnecessary to consider how the matter would have stood had the plaintiff been a trespasser. The case of *Mangan v. Atterton*, 4 H. & C. 888; L. R., 1 Ex. 239, was cited before us as a strong authority in favor of the defendant. The defendant had there exposed in a public market-place a machine for crushing oil cake without its being thrown out of gear or the handle being fastened, or any person having the care of it; the plaintiff, a boy of four years of age, returning from school with his brother, a boy of seven, and some other boys, stopped at the machine. One of the boys began to turn the handle; the plaintiff, at the suggestion of his brother, placed his hand on the cogs of the wheels, and the machine being set in motion, three of his fingers were crushed. It was held by the Court of Exchequer that the defendant was not liable; first, because there was no negligence on the part of the defendant, or if there was such negligence, it was too remote; secondly, because the injury was caused by the act of the boy who turned the handle, and of the plaintiff himself, who was a trespasser. With the latter ground of the decision we have in the present case nothing to do, otherwise we should have to consider whether it should prevail against the cases cited with which it is obviously in conflict. If the decision as to negligence is in conflict with our judgment in this case, we can only say we do not acquiesce in it. *It appears to us that a man who leaves in a public place along which persons, and among them children, have to pass, a dangerous machine which may be fatal to any one who touches it, without any precaution against mischief, is not only guilty of negligence, but of negligence of a very reprehensible character, and not the less so because the imprudent and unauthorized act of another may be necessary to realize the mischief to which the unlawful act or negligence of the defendant has given occasion. But be this as it may, the case cannot govern the present. For the decision proceeded expressly on the ground that there had been no default in the defendant; here it cannot be disputed that the act of the defendant was unlawful. On the whole, we are of opinion, both on principle and authority, that the plaintiff is entitled to our judgment."*

MCBRATNEY V. CHANDLER.

(22 Kana. 692.)

Attorney and client — contract — lobby services.

The contract of an attorney for services as such before a department of government or a legislative body is valid, but for lobby services is void, and where it is for both the entire contract is vitiated.*

ACTION for attorney's services. The opinion states the facts. The defendants had judgment below.

W. R. Wagstaff, for plaintiff in error.

J. A. Hoag, for defendants in error.

* To same effect, *Weed v. Black* (3 McArthur 368), 29 Am. Rep. 618.

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BREWER, J. This action was originally commenced in the Probate Court of Miami county, by the plaintiff, Robert McBratney, against the defendants, for moneys had and received by Charles Sims, in his lifetime, belonging to the said McBratney, as attorney's fees, in the prosecution of the matter of the Miami Indians of Kansas, in the city of Washington, D. C., as follows:

May 12, 1872, cash.....	\$170
Dec. 15, 1873, cash.....	175
Nov. 1, 1874, cash.....	950
	<hr/>
	\$1,295

With interest on the respective sums from the dates given.

No pleadings were filed other than a simple statement of an account, in the language just quoted. The Probate Court disallowed the claim, and McBratney appealed. In the District Court, after the plaintiff had rested, a demurrer to the evidence was sustained, and from this ruling plaintiff brings error. We think the court erred, and that the case was one which ought to have been left to the jury. That McBratney was employed, that he rendered services, and that Sims received money in payment of services from the Miamis, the testimony abundantly establishes. Whether Sims employed McBratney on his own account, or for and by authority of the Indians, and what the amount of McBratney's compensation was to be — whether one-half of all that Sims received, or simply a reasonable compensation for his services — are questions which the testimony leaves open to doubt. Of course, upon all such doubtful questions of fact, a party has a right to the opinion of the jury. Thus far we presume there would be no dispute between counsel; but the contention of the counsel for defendant in error is that the services which were rendered were such as are forbidden by public policy, and that therefore any contract to pay therefor was void. We quote from counsel's brief:

“Now the propositions proven by all the testimony are these: 1. Sims employed McBratney. 2. Sims employed plaintiff to influence legislation, and to use his personal influence with senators, members of congress and the heads of executive departments. 3. The pay of plaintiff was contingent upon success.”

Doubtless it was upon this theory that the demurrer was sustained, and while there is abundant testimony to justify such a conclusion, yet we are constrained to think that it does not all tend in that direction. And because it does not, the court was not warranted in

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withdrawing the case from the jury. It appears that certain matters were pending before the department at Washington, and congress, in which the Miamis were interested, and in these matters Sims was employed by the Indians. To assist Sims, McBratney was employed. The exact terms of the contract and the exact nature of the services performed are in doubt. If all that was contemplated was the preparing of briefs, the making of oral arguments before the department or a committee of either house, the contract was valid and the services legitimate. If the employment of plaintiff was as a lobbyist, and to render the services usually rendered by such parties, the contract was against public policy, and void. We had occasion to notice this question, and draw the line of distinction between the two classes of services, in the case of *K. P. R. W. Co. v. McCoy*, 8 Kas. 543, and it is unnecessary to more than refer to that case. See, also, the cases of *Marshall v. B. and O. R. R. Co.*, 16 How. 314; *Tool Co. v. Norris*, 2 Wall. 45; *Trist v. Child*, 21 id. 441, in which the Supreme Court of the United States has fully and clearly discussed the question. This briefly may be stated to be the law: The contract of an attorney for services as such, whether the services are to be rendered before a court, a department of the government, or a legislative body, is valid, and upon performance of the services a recovery can be had. The contract of a lobbyist, in the sense in which that term is now used, for his services as such, is against public policy, and void. Where there is a single contract, and the services contracted for and rendered are partially those of an attorney and partially those of a lobbyist, and blended together as part and parcel of a single employment, the entire contract is vitiated. "That which is bad destroys that which is good, and they perish together." There is no presumption that a contract is illegal. He who denies his liability under a contract which he admits having made, must make the fact of its illegality apparent. The burden of showing it wrong is on him who seeks to deny his obligation thereon. The presumption is in favor of innocence, and the taint of wrong is matter of defense.

Because the testimony is not all one way, the question should have been submitted to a jury, and there was error in sustaining the demurrer.

The judgment will be reversed, and the case remanded for a new trial.

All the justices concurring.

Atchison, Topeka and Santa Fé Railroad Company v. Hammer.

ATCHISON, TOPEKA AND SANTA FÉ RAILROAD CO. v. HAMMER.

(22 Kana. 763.)

Water and water-courses — obstruction of surface-water on one's own land.

A railroad company constructed an embankment on its own land, whereby the surface-water was thrown upon the land of an adjoining owner. *Held*, that no action would lie therefor, although the company could have prevented the injury by a culvert.*

ACTION for damages by causing overflow of water on defendant's land. The opinion states the facts. The plaintiff had judgment below.

Ross Burns, J. G. Waters and W. C. Campbell, for plaintiff in error.

Sterry & Sedgwick, for defendant in error.

BREWER, J. This was an action to recover damages to crops from the overflow of plaintiff's lands. The case was tried upon an agreed statement of facts and judgment rendered in favor of the plaintiff. The following is all there is in this statement as to the cause of the overflow:

"That the said lands of plaintiff were so overflowed in consequence of a culvert built by defendant on its right of way being insufficient to let the amount of water running and falling on said lands pass through it, and also, in consequence of the embankment of its said line of railroad on its said right of way, along and adjoining the said lands of plaintiff, being so high as to not permit the passage of the water running and falling on said lands or passing over the top thereof."

There is nothing in this or elsewhere in the record tending to show the existence of a water-course. On the contrary, the plain implication is that the embankment simply prevented the flow of surface-water and thus caused it to accumulate upon the lands of plaintiff. Does this give a cause of action? We think not. The general rule undoubtedly is that no action lies for obstructing the flow of surface-water. It was well said by BEASLEY, Ch. J., in *Bowlsby v.*

* To same effect, *Taylor v. Fickas*, *ante*, p. 114.

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Speer, 2 Vroom, 351, that "there is no such thing known to the law as a right to any particular flow of surface-water *jure naturæ*. The owner of land may, at his pleasure, withhold the water falling on his property from passing in its natural course on to that of his neighbor, and in the same manner may prevent the water falling on the land of the latter from coming upon his own." See, also, *Swoett v. Cutts*, 50 N. H. 439; *S. C.*, 9 Am. Rep. 276; *S. C.*, 11 Am. Law Reg. (N. S.) 11, and notes of REDFIELD, J.; Ang. on Water-courses (6th ed.), § 108 *a*; *Dickinson v. Worcester*, 7 Allen, 19; *Wheeler v. Worcester*, 10 id. 591; *Parks v. Newburyport*, 10 Gray, 28; *Flagg v. Worcester*, 13 id. 601; *Goodale v. Tuttle*, 29 N. Y. 459; *Frazier v. Brown*, 12 Ohio St. 294; *Wagner v. L. I. R. R. Co.*, 2 Hun, 633.

There are doubtless exceptions to this general rule. One such was noticed by this court in the case of *Palmer v. Waddell*, *ante*, p. 352. See, also, the case of *Livingston v. McDonald*, 21 Iowa, 161, in which may be found some valuable discussions by DILLON, J., of the relative rights and obligations of the upper and the lower land owner.

But no exception is shown to the general rule by the fact that the party raising the embankment is a railroad corporation, and the embankment raised upon its right of way for use as a railroad track, nor by the fact that a culvert could have been placed in such embankment sufficient to have afforded an outlet for all such surface-water, nor by the fact that a culvert was placed therein insufficient to afford such outlet.

Neither is the plaintiff's case helped by section 1, chapter 93, Laws 1870, page 197, which provides that railroads shall be liable for all damages "when done in consequence of any neglect on the part of the railroad companies," for when there is no obligation to do an act, there is no negligence in omitting to do such act. The cases cited by counsel for plaintiff are all of them cases of water-courses, concerning which the rule is different, except the cases from Indiana and Illinois. *R. R. Co. v. Deitz*, 50 Ill. 210; *T. W. and W. R. R. Co. v. Morrison*, 71 id. 616; *I. B. and W. R. R. Co. v. Smith*, 52 Ind. 428; and those cases, unless founded on some local statute, do not commend themselves to our judgment.

The judgment of the district court will be reversed, and the case remanded with instructions to render judgment on the agreed statement in favor of the defendant (plaintiff in error) for costs.

All the justices concurring.

CASES
IN THE
SUPREME COURT
OF
LOUISIANA.

ELLERMAN V. McMAINS.

(80 La. Ann. 190.)

Constitutional law — right of municipal corporation to collect wharfage — legislative interference.

Where a municipal corporation, under the express authority of an act of the legislature, is clothed with the exclusive right to collect wharfage rates from all vessels that shall make use of its wharves, the right is both constitutional and vested, and cannot be abrogated or impaired by any subsequent act of the legislature.

ACTION for wharfage dues. The opinion states the facts. The plaintiff had judgment below.

F. D. King, for plaintiff and appellee.

Charles S. Rice, for defendant.

MANNING, Ch. J. The defendants are the owners of the steamboat *Martha*, which was wholly built in this State, within seven years last past, and is of more than one hundred tons measurement. The plaintiff, as lessee of the city of New Orleans of the wharves on the Mississippi river in its front, claims fifty-six dollars from the boat and its owners for the use of the wharves. The defendants claim exemption from liability for these charges under an act of 1874

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wherein it is enacted that any steamboat or other water craft wholly built in the State of Louisiana, of more than one hundred tons measurement, shall not pay to any corporation fees for wharfage, provided that such exemption shall not extend beyond seven years from completion or registration of the vessel. Acts, p. 261. The plaintiff alleges the unconstitutionality of that act. The court so adjudged, and the defendants appeal.

The right of the city to establish charges for the use of the wharves constructed by her was conferred in the charter of 1836. Acts, pp. 33, 36. Similar grants of power were made in 1870. Acts, ex. sess. p. 35, and in 1871, Acts, p. 147. Large sums have been expended by her authorities in the construction and repair of the wharves, and it is now no longer disputed that where the charge made by the corporation is for services rendered, or for conveniences provided, it can be lawfully imposed. The Supreme Court of the United States say in a recent case: Where a municipal corporation of a State has by the laws of its organization an exclusive right to make wharves, collect wharfage, and regulate wharfage rates, it can charge and collect wharfage, proportionate to their tonnage, from vessels and steamboats mooring and landing at wharves constructed on the banks of a navigable river. Where it is clearly a duty or tax or burden, which in its essence is a contribution claimed for the privilege of entering the port, or remaining in it, or departing from it, imposed by the authority of the State, and measured by the capacity of the vessel, it is conceded to be prohibited. But where it is only a charge for services rendered, or for conveniences provided, it is lawful. The prohibition to the States against the imposition of a duty of tonnage was designed to guard against local hindrances to trade, and carriage of vessels, not to relieve them from liability to claims for services rendered. The tax or duty is laid by the sovereign. The charge for the use of the wharves is made by the proprietor, and it is the same whether made by the State, a municipality, or a private individual. *Keokuk N. L. Packet Co. v. City of Keokuk.*

The exclusive right to regulate and make improvements to the wharves, and to lease them, having been thus lawfully conferred upon and delegated to the city, it became the private right of the corporation and not subject to divestiture without due legal process and compensation therefor, as contradistinguished from a public right which may be abrogated by the State at its pleasure. The right to acquire, hold and dispose of property, though originally

derived by a corporation from the legislature, is not subject to the absolute control of that body. "The rule upon the subject," says Cooley, "we take to be this. Where corporate powers are conferred, there is an implied compact between the State and the corporators that the property which they are given the capacity to acquire for corporate purposes under their charter, shall not be taken from them and appropriated to other uses. If the State grants property to the corporation, the grant is an executive contract which cannot be revoked. The rights acquired, either by such grants or by any other legitimate mode in which such a corporation can acquire property, are vested rights, and cannot be taken away." Const. Lim. 238. And another writer thus clearly defines the distinction between the authority of the legislature over public and private rights of a corporation: "Over all its civil, political, or governmental powers, the authority of the legislature is in the nature of things supreme, and without limitation, unless the limitation is found in some peculiar provision of the Constitution of the State. But in its proprietary or private character, the theory is that the powers are supposed, not to be conferred primarily or chiefly from considerations connected with the government of the State at large, but for the private advantage of the particular corporation as a distinct legal personality; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regulated *quoad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it is omnipotent." Dill. Munic. Corp. § 39. The act of 1874 was a partial revocation of the grant previously made to the city, and was not within the power of the legislature to make, for if it could revoke the grant as to vessels of over a hundred tons that were built in a particular place, it could revoke it as to vessels of any tonnage that were built at any place, and thus the legislature would effect the divestiture of a vested right. The State cannot take away property or rights of this kind arbitrarily and without process of law or compensation, under the guise of encouraging the building of water craft within her own borders. If she can give the use of the wharves, free of charge, to boats because they have been built within the State, and to encourage that handicraft, she can likewise give them free of charge to every vessel that is manned by natives of the State, in order to induce her citizens to become hardy sailors and "brave the terrors of the deep." The act, under which the defendants claim

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exemption from liability to the payment of wharfage, being unconstitutional, is null and void, and judgment was therefore correctly rendered against them and the steamboat Martha for the sum claimed by the plaintiff.

Judgment affirmed.

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(30 La. Ann. 220.)

Municipal corporation — liability for injury from defective street.

A city bound by its charter to keep its streets in repair is liable to one who, without negligence on his own part, suffers injury from their long continued and notorious want of repair.

ACTION for damages for personal injuries. The opinion states the facts. The plaintiff had judgment below.

Chas. S. Rice, for plaintiff and appellee.

B. F. Jonas, city attorney, for defendant.

DE BLANC, J. On the 18th of May, 1872, while crossing from Magazine to Canal street, plaintiff stepped upon a flag-stone destined to span the gutter at the junction of those streets, one end of which was then lying in said gutter. He then and there slipped, fell with violence, broke his right leg over the knee, and on that account was out of employment for the space of seventeen months.

He brought suit against the city, charges that the injury he has sustained was the immediate result of its neglect to perform a prescribed, an absolute duty, and claims against it as damages the sum of \$10,000. The city, after a general denial, specially denied that it had knowledge or notice of the bad condition of the crossing on Magazine street, or that it neglected to repair the same.

Long before the accident the flag-stone on which plaintiff slipped and fell, and on which, on the same day and before, others had slipped and fallen, had often been knocked out of place by drays and floats and merely replaced but never fastened over the gutter except once and then by driving a wooden pin on one side of the stone.

Not disposed to encourage any speculative litigation against the city we have examined, with care, the evidence adduced on the trial. Not one of the witnesses who testified on that occasion, not even plaintiff, has attempted to exaggerate any of the facts related by them. That evidence establishes that when the accident happened plaintiff was sober, walking without haste on his way to his home, and that he in no manner contributed to said accident.

The city's counsel contends that its authorities and employees cannot ever be on hand to repair breakages; that besides, this accident occurred in the broad day; that plaintiff was guilty of carelessness, of contributive negligence, and that the judgment of the lower court which allows him \$1,000 should, with the verdict on which it is based, be avoided and reversed.

By the twenty-sixth section of its charter the city of New Orleans is bound to keep in repair its paved and unpaved streets, and though not an insurer against accidents the city is liable for those injuries which result from its neglect to maintain, in a safe condition, the sidewalks and bridges within its limits. Dill. Mun. Corp., § 789. "It is the almost uniform doctrine of the courts that municipal corporations are also liable when the wrong resulting in an injury to others consists in a *mere neglect* or omission to perform an *absolute and perfect*, as distinguished from a discretionary or imperfect corporate duty, or for the want of proper care of its officers or servants acting under its direction or authority in the execution of a prescribed duty." Dill. Mun. Corp., § 778.

If an accident were to happen by the displacement of a flag-stone spanning a gutter, and before the city, in the discharge of an absolute duty, could have ascertained the condition of the crossing and have it repaired, it is clear that the city could not be held liable; but the fact of such a displacement can and must be ascertained within a reasonable delay, within that delay which, according to circumstances, should be allowed to those who have the exclusive control of the streets of a city. In this instance the flag-stone was several times raised from and placed over the gutter without fastening it by the neighbors and by the employees of the city.

That plaintiff might have avoided the accident we admit, but how? By presuming that on his route there was somewhere a bridgeless gutter, by following another route, or by taking a cab or the cars. As well said in *Hunt v. Pownal*, 9 Vt. 411: "In every case of damage occurring in the highway we could suppose a state of cir

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circumstances in which the injury would not have occurred. If the team had not been too young or restive, or old or too headstrong, or the harness had not been defective or the carriage insufficient, no loss would have intervened. It is against these constantly occurring accidents that towns are required to guard in building highways. The traveler is not bound to see to it that his carriage is always perfect and his team of the most manageable character and in the most perfect training before he ventures on the highway. If the plaintiff is in the exercise of ordinary care and prudence and the injury is attributable to the insufficiency of the road, conspiring with some accidental cause, the defendants were liable."

The court said, in the case of the city of *Joliet v. Verley*, 35 Ill. 65: "Travelers have a right in passing along such a place, a passageway to a bridge, to have at least a secure footing, and it was the duty of the city to provide one. Loose planks, so warped that a traveler cannot step upon them without dangerous oscillation, may, in the opinion of witnesses, make a safe walk over such a place, but they do not furnish a walk having that degree of safety which the law requires. Sidewalks are to be used by common people, and only a few of them are expected to possess the skill of a Blondin."

"Where the loss is the combined result of an accident and of a defect in the road, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident, yet if there be no fault or negligence of the plaintiff, if the accident be one which common prudence and sagacity could not have foreseen and provided against, the town is liable." *Palmer v. Andover*, 2 Cush. 600.

In this case the defect which caused the accident was often seen by, and well known to, some of those employed by the city to repair its streets, and nevertheless, the crossing on Magazine street never was repaired. The flag-stone remained in that condition a trap to the unsuspecting traveler, and so far as we are informed, from the very first day on which it was knocked out of place until the accident happened. The city is evidently liable in damages.

Both parties complain of the jury's verdict. Defendant prays that it be annulled, plaintiff that the amount allowed him be increased. The facts and the law justify the jurors' verdict and the decree appealed from.

That decree is affirmed, with costs.

First Presbyterian Church v. City of New Orleans.

FIRST PRESBYTERIAN CHURCH V. CITY OF NEW ORLEANS.

(30 La. Ann. 259.)

Taxation — exemption — parsonage or rectory.

A statute exempted from taxation churches and other public buildings for religious worship, with the appurtenant lots of ground used therewith for that purpose. *Held*, that this did not embrace a parsonage or rectory.*

SUIT to recover taxes alleged to have been unlawfully exacted. The opinion states the facts. The defendant had judgment below.

Singleton & Browne and John P. Smith, for plaintiff and appellant.

Samuel P. Blanc, for defendant and appellee.

MANNING, Ch. J. The city of New Orleans obtained judgment against the First Presbyterian Church for taxes of 1874, on an assessment against two pieces of its property. This judgment became final and execution issued, under which was collected from the defendants in execution \$580.80 for the amount of judgment and costs.

Afterwards the city sued to recover \$532.50 for taxes of 1876 assessed on several pieces of property. The present suit is to obtain the repayment to the plaintiff of the sum paid in satisfaction of the judgment for the taxes of 1874, and also to have established the exemption of all of its lots from taxes.

The money paid in satisfaction of the judgment for the taxes of 1874 cannot be recovered back. It was rendered after a due observance of all the forms for that kind of action. Its nullity is not alleged nor prayed, and until set aside for some legal cause, or reversed on appeal, it must stand good, and the money paid under it remains the property of the defendant.

A part of the property assessed for taxation in 1876 is a lot and improvements used as a school-house and grounds. The testimony is that the school is established by the church, and is conducted under its supervision, and the lots adjacent to it are used for pur-

* Compare *Trustees of Griswold College v. State* (46 Iowa, 278), 26 Am. Rep. 133.

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poses of ingress and egress to the school building. This property is exempt under that clause of the Revised Statutes which exempts school-houses and the lots appurtenant.

But it is further claimed that a building and lot, used as a parsonage or rectory, is also exempt, and we do not think the law sanctions that exemption. The rule is that all property is liable to taxation. The legislature, acting in subordination to the Constitution, has exempted certain classes or descriptions of property. Among the exemptions are "colleges, school-houses and other buildings for the purpose of education, and their furniture, apparatus and equipments, and the lots thereto appurtenant and used therewith, so long as actually used for that purpose only." § 3233. Parties who claim exemption from taxation must show that they belong to one of the favored classes, and we do not construe the terms of the above recited enactment as including a residence of the clergyman who officiates in the church. It is a matter of no consequence whether the rectory is on an adjacent lot to the church or whether it is separated from it by several streets or blocks of buildings, as this is. The residence of the clergyman is in no proper or legitimate sense appurtenant to the church; and is not exempt from taxation. It may be very convenient, as it certainly is very proper, that the church should own a lot and building, devoted or appropriated to the use of the rector as a residence, but it must be taxed until the legislature shall enlarge or increase the classes of exempted property.

Judgment affirmed.

MARR and EGAN, JJ., took no part in the decision of this cause.

ON APPLICATION FOR REHEARING.

SPENCER, J. In the opinion of the court heretofore rendered, by inadvertency, paragraph No. 2 was referred to and copied instead of paragraph No. 4 of section 3233 of the Revised Statutes. The latter paragraph is as follows:

"Churches, chapels, convents and *other public buildings for religious worship*, with the furniture and equipments and *lots of ground* thereto appurtenant and used therewith, so long as the same shall be actually used *for that purpose only*."

The counsel insists that not only the church, "but property actually used for the '*purposes*' of the church," is exempt. He argues that the parsonage is a property used *for the purposes* of the church,

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inasmuch as a church must have a parson, and the parson must have a house. We do not understand the words "for that purpose only" in the statute quoted as having any such meaning. They refer to, and are used to avoid repetition of the words "for religious worship." The substance and marrow of the law may be stated thus: Churches, and other *public buildings for religious worship*, with their appurtenant grounds, are exempt from taxation so long as they are actually used "*for that purpose*," i. e., "*for religious worship*." A parsonage may be property used *for church purposes*, but it cannot be said to be used "*for religious worship*." The dominant idea in the statute is that the exemption shall be limited to "*public buildings*" and appurtenant "*lots of grounds*," used "*for religious worship*."

Exceptions to general laws are always to be strictly construed—a party claiming exemption from their operation must bring himself clearly within some exception. These are elementary rules of interpretation.

Rehearing refused

McKNIGHT v. PARISH OF GRANT.

(30 La. Ann. 361.)

Mechanics' lien on municipal building.

Although land donated and devoted to public uses cannot be subjected to debts of the municipality, yet a public building thereon, as a jail, is subject to a mechanics' lien in favor of one who built it for the municipality.*

SUIT to enforce a mechanics' lien. The opinion states the facts.

R. A. Hunter, for plaintiff and appellant.

A. Cazabat, parish attorney, for defendant.

SPENCER, J. The police jury of the parish of Grant, by ordinance, appointed a committee to contract for building a public jail at Colfax; made the necessary appropriation, and levied a tax of two mills to pay for the same. The contract was made with plain-

* *Contra: Leonard v. City of Brooklyn* (71 N. Y., 496), 37 Am. Rep. 53.

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tiff, who undertook to furnish all the material and build the jail for \$1,000, payable in cash when completed. There is no dispute that he fully complied with his contract. The parish authorities received the building, and have ever since occupied it. Plaintiff duly recorded his contract. Only \$155 have been paid him, and as it seems no effort is made to collect the tax, or if collected, as it has not been paid to him, he brings this suit for the balance due him, and claims the mechanics and builders' lien on the jail, and on one acre of ground on which it is situated, under article 3249 of the Civil Code.

The district judge gave him a judgment for the amount due, but refused to recognize his lien, and plaintiff appeals. It seems that the land on which the jail is built was expressly bought and donated to the parish, for the purpose of a jail lot. We have lately held, in the case of *Parish Plaquemines v. Foulhouze*, that under such circumstances, the land has been dedicated to public uses and cannot be seized for debts of the parish. That it does not constitute property of the parish in the ordinary acceptation of that term, being out of commerce and belonging to the public.

But because the soil upon which a building is erected cannot be sold to pay the cost of its erection, it by no means follows that the building itself may not be. The 3249th article of the C. C. gives the lien "upon the building *and* upon the lot of ground;" and then proceeds to provide for the case where the lot of ground belongs to another than the party having the work done, and where, therefore, it is not alienable in satisfaction of the debt. We think the spirit of this article requires us to recognize the lien on the building. It would be monstrous to allow the parish to appropriate another man's material and labor in the form of a house, and refuse to pay him because the land on which it is built is inalienable and out of commerce. The builder in such a case as this may be in some sort assimilated to a vendor of the materials and labor represented in the house. Good conscience forbids that he be denied the right to subject the building to his debt.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be and is so amended as to recognize and render executory the building lien claimed by plaintiff on and upon the jail building of the parish of Grant, at Colfax, and that the same be seized and sold to satisfy plaintiff's judgment. That in other respects the judgment appealed from be affirmed, and that defendant pay the costs of appeal.

CITY OF NEW ORLEANS V. DAVIDSON.

(30 La. Ann. 541.)

Taxation — municipal corporation — offset of debt against tax.

A debt due to a municipal corporation for taxes cannot be offset by any debt due by the corporation. Thus a tax due for one year cannot be compensated by an overpayment of taxes made by the debtor the year previous.

ACTION for tax. The opinion states the facts. The plaintiff had judgment below.

Sam. P. Blanc, for plaintiff and appellee.

Ogden & Hill, for defendants and appellants.

MANNING, Ch. J. Several suits of the city of New Orleans against delinquent tax-payers are here cumulated without objection. The collection of the taxes of 1874 was resisted on various grounds, of which one only is now insisted on, viz., that each defendant is entitled to offset any tax which he may owe the city, by the sum he paid to its tax collectors for taxes of 1870 in excess of two per centum on the assessed value of his property.

In 1870 the city assessed and collected a tax of two and three-eighths per cent on the assessed value of the property. The act of March 16, 1870, restricted cities and municipal corporations from levying any tax for any purpose exceeding two per centum on that value. Acts 1870, ex. sess. p. 130. The defendant paid the whole assessed tax of 1870, and therefore, as they allege, paid three-eighths of one per cent more than the city should have demanded. In these cases this excess amounted to \$1,641.36. The defendants plead that sum in compensation of the taxes of 1874.

A tax is not a debt in the usual and ordinary sense of that word. It is not a contract between two parties, but the imposition of a tax is the positive act of the government, binding upon the inhabitants, and does not require their individual or personal consent to enable it to be enforced. Taxes are not demands against which a set-off is admissible, says Cooley. Taxation, 13 and authorities cited in note.

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They are to be regarded not as a debt, but as a contribution required from the citizen for the support of government. *Union Co. v. Bordelon*, 7 La. Ann. 192. Considerations of public policy require that a tax of one year should not be compensated by an overpayment of a previous year. The taxes of each year are laid to meet the exigencies of that year. If they could be reduced by a deduction of such sums as had been already wrongfully demanded and paid, the revenues requisite for the support of government might be diminished so largely as to occasion public detriment. But outside of this public policy, as a matter of law, taxes are not such demands as admit of a plea in compensation.

This does not, of course, touch the question of the right of the property owner, who has paid to the city a tax illegally exacted of him, to sue for such sum as was wrongfully paid. We are here concerned only with his alleged right to compel the city to compensate her tax of one year by an overpayment of a previous year, and this is condemned both by law and public policy.

Judgments affirmed.

MONATT V. PARKER.

(30 La. Ann. 585.)

Gift — executed — revocation.

One who has made a donation *inter vivos* of immovable property to his concubine, cannot, on the latter's death, recover the property, on the ground that the donation violated a prohibitory law, and was opposed to good morals.*

ACTION to recover a gift. The opinion states the facts. The defendant had judgment below.

Edoard Phillips, for plaintiff and appellant.

W. O. Denégre, for defendant and appellee.

MARR, J. The plaintiff alleges in his petition that he purchased a mulattress slave named Mathilde in 1847, whom he emancipated in 1858; and that he lived in concubinage with her from the date of

* See *De Leon v. Trevino* (49 Tex. 86), 30 Am. Rep. 101, and note.

his purchase until her death, which occurred in April, 1877. That on the 3d of May, 1870, he purchased a certain lot of ground for \$1,500, for which he paid.

That being about to make a voyage to Europe, and desiring to make provision for his concubine in the event of his death during his absence, he caused the title to this lot to be taken in her name by notarial act. That he was absent in Europe about six months, and on his return he had buildings and improvements put on the property, which cost some \$3,000, all of which he paid; that he also paid the taxes on the property, collected the rents and gave receipts for them in his name; that Mathilde had no means; that he is the lawful owner of the property, and has been in possession since the purchase, in 1870. That after the death of Mathilde he paid the expenses of her last illness, funeral expenses and all the debts of the succession; that she had nothing, and her succession owed nothing; and that she left no ascendants, nor descendants, nor collateral relatives, nor legal heirs. That Parker, public administrator, has been appointed administrator of her succession; and has taken possession of the property in question, as belonging to the succession, and has obtained an order of court requiring it to be inventoried as well.

That the notarial act of May 3, 1870; the conveyance of the property to Mathilde, is null and of no effect, and in violation of "positive prohibitory law;" and if the act can have any effect, it is only as a donation from petitioner to his concubine, which is prohibited by law, and is contrary to good morals and public policy. The suit is brought to recover the property and thirty dollars a month for rent during the time the administrator holds possession; and to have the act of May 3, 1870, so far as it purports to convey any right or title to Mathilde, decreed to be absolutely null and void and of no effect whatsoever. The administrator excepted that the petition exhibits no cause of action against him; and plaintiff is appellant from the judgment maintaining that exception and dismissing the suit.

We think the reference to "good morals and public policy" comes with rather a bad grace from plaintiff, who prostituted his own slave, made her his concubine, and lived with her in that degraded relation for thirty years, in flagrant violation of "good morals, public policy," and common decency.

The law does indeed prohibit donations of immovables between those who have lived in concubinage; and of movables exceeding one-tenth of the value of their estates, respectively. R. C. C. 1481.

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But such dispositions cannot be attacked by the parties themselves. The heirs or the creditors of the donor may invoke the nullity of donations in fraud of the law and of their rights by alleging and proving his turpitude, which he would not have been permitted to do in his own behalf.

That which one promises to give for an illegal or immoral consideration he cannot be compelled to give; and that which he has given on such a consideration he cannot recover. The law will not afford relief to either party, *in pari causâ turpitudinis*; but leaves them just where they have placed themselves. See *Mulhollan v. Voorhies*, 3 N. S. 46; *Gravier v. Carraby*, 17 La. 118; *Pucket v. Clarke*, 3 Rob. 82.

The Roman law did not permit that to be recovered which had been given for an illegal or immoral consideration; nor did it allow any action to enforce promises and undertakings made on such consideration. Such an action as that brought by plaintiff in this case would not have been tolerated under that system:

“*Si ob stuprum datum sit * * * quod meretrici datur, repeti non potest.*” Dig. lib. 12, tit. 5, l. 4. The rule and the reason for it are stated very clearly and forcibly by the Emperor Antoninus:

“*Cum te propter turpem causam, contra disciplinam temporum meorum domum adversariæ dedisse profitearis: frustra eam tibi restitui desideras, cum in pari causâ possessoris conditio melior habeatur.*” Code, lib. 4, tit. 7, l. 2.

It may be questioned whether the concubine of her master who continues in that relation after her emancipation is *in pari causâ turpitudinis* with him. It is certain that he could not, during her lifetime, have maintained an action against her for the recovery of the property; and her death has not invested him with any right which he had not during her life. All that plaintiff alleges in his petition may be true; it must be assumed to be true for the purposes of this decision; but it only serves to show that he is attempting now to avoid the legitimate consequences of his own acts and conduct in violation of “good morals and public policy.”

The exception was properly maintained, and the judgment appealed from is affirmed with costs.

City of New Orleans v. Mechanics and Traders' Insurance Company.

CITY OF NEW ORLEANS v. MECHANICS AND TRADERS' INSURANCE COMPANY.

(80 La. Ann. 876.)

Constitutional law — "property" subject to taxation — notes, bills, etc.

The notes, bills, etc., representing money loaned at interest by a corporation, are its "property," and are liable to taxation within the Constitution.*

SUIT for taxes. The opinion states the facts. The plaintiff had judgment below.

Saml. P. Blanc, for plaintiff and appellee.

H. N. & O. N. Ogden, for defendants.

SPENCER, J. This is a suit to recover of the defendant \$1,846.25, taxes of 1875, on an assessment of "personal property," to wit: "Merchandise, capital, and money at interest."

The defense relied upon in this court is, that "credits," "money at interest," are not *property* within the meaning and intent of article 118 of the Constitution, and that the legislature has no authority to impose, therefore, a tax upon them.

The argument is, that to tax credits, promises to pay, notes, bills, etc., is double taxation. Thus, if A loans B \$1,000, and takes his note therefor, you tax the money *once* in B's hands, and the same money again in A's under the name of *credits*. It is argued that this process ultimates in the borrower paying a double tax; for it is said that the lender will increase his interest to the extent of the tax, and thereby throw upon the borrower eventually both taxes. If this be so it might afford the borrower a strong argument for resisting *his* taxes; but we are at a loss to see why the lender should complain, since the theory is that he ultimately pays no tax at all — imposing his taxes on the debtor's shoulders. At all events, it is not pretended that the creditor pays two taxes. At most, he pays but once, and we do not see what mission he has to protect anybody but himself from wrongful taxation. Credits represent *value*, so

* To same effect, *Williamson v. Harris* (57 Ala. 40), 29 Am. Rep. 707.

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much so that it is admitted that to the extent that a man is in debt, to the same extent his creditors may be said to have an eventual title to his property. Now, the proposition is that this creditor class who may in reality own thus, indirectly, the whole property of a State, shall pay nothing for the support of the government. It seems to us that this result is exceedingly inequitable, and that if anybody is to be exempted from taxation on the amount of these credits, it should be the man who owes them, and whose property and possessions are diminished in value by the amount thereof.

The argument by which it is attempted to be shown that notes bills, bonds, stocks, etc., are *not property* is too sublimated and metaphysical to be practical in matters of legislation. If they are not property they represent value and produce revenue. But to say that our Constitution forbids them to be considered as property would be to expunge from our Codes provisions and principles that are as old as the civil law. See C. C. 474, 481, 483, 484, 491, 2642, 3155, and many others. C. P. 642, 676. They are classed as "things," may be bought, sold, appraised, seized, and make up and constitute the wealthiest patrimonies in the world. Is it not rational, in seeking the meaning of the word "property" in the Constitution of 1868, that we ascertain what has always been its acceptation in our law, in our jurisprudence and by common usage? And when we ascertain that from time immemorial "incorporeal things" of the kind in question have been held and treated as embraced in the term "property," shall we turn our back on all this and run away after the metaphysical abstraction that "property is always, and of necessity, a physical actuality?"

It is our duty to interpret words in a statute "in their ordinary and usual signification" as they are "popularly used." C. C. 14.

We are referred to no authority for the proposition that notes, bonds, stocks, etc., are not property, except that of the Supreme Court of California in *People v. Hibernia Savings Society*, 51 Cal 243; *S. C.*, 21 Am. Rep. 704, and that of a writer in the *Atlantic Monthly* for September, 1877. These productions are certainly able and ingenious discussions of the abstract nature of property. But it is a full answer for us to say that we are here to interpret the laws of this State as the framers thereof intended and understood them; and we are tempted to say of this California decision what Mr. Walker, in his work on Taxation, p. 59, says of it: "We venture to affirm that the idea that these evidences of debt are not property, in

the legal acceptation of that term, never before entered the brain of a lawyer."

But it seems to us that if it were conceded that these credits are not property it would not follow that the legislature could not tax them. The theory of our government is that a State legislature may do anything which *is not prohibited* in the State or Federal Constitutions. Now, strip these "credits" of their title as "property" and you thereby make them *nondescripts*, and *there is no prohibition* in the Constitution against taxing them "as credits" *ad libitum*, for it is only "property," "incomes" and "trades," the taxation of which is restricted by the Constitution. We think it better and safer for capitalists that we adhere to the old landmarks and treat them as "property holders," in duty bound to contribute like other people in proportion to their means and the protection accorded them, to the expenses of the government.

The judgment appealed from condemned the defendant to pay the amount claimed, with interest and costs, and it is affirmed.

STATE V. ROLLE.

(30 La. Ann. 991.)

Constitutional law — equality of taxation.

The law imposing a smaller license tax on proprietors of bars, or drinking saloons, kept on steamboats owned and registered in Louisiana, than on the owners of bars kept on land, does not violate the clause of the Constitution prescribing equality and uniformity of taxation.

ACTION for tax license. The opinion states the facts. The plaintiff had judgment below.

Jas. C. Egan, Assistant Attorney-General for plaintiff and appellee.

Frank D. Cretien, for defendant.

DEBLANC, J. Defendant has appealed from a judgment condemning him to pay to the State, as keeper of a bar-room a license of eighty-five dollars — as a grocer one of fifteen dollars. The first

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mentioned of these licenses — that of eighty-five dollars — is claimed under section 10 of act No. 14 of 1872, which reads as follows:

“From the proprietors of all coffee-houses, bar-rooms, beer-saloons or gardens \$85: from the proprietors of *all bars kept on steamboats, owned and registered in this State* \$50.”

Defendant resists the payment of the license of eighty-five dollars on the ground that the section of the act of 1872, under which it is levied, discriminates between those who carry on on land and those who pursue on water what he considers as being but one and the identical occupation.

In his book on Taxation, Burroughs says: That — except in only one of the States — the provisions as to equality and uniformity do not apply to taxes on licenses, whether those provisions be mentioned in the Constitution or not. P. 167. The license is granted by the State under its police power; it is a personal privilege — not a contract; the tax paid is not regarded as the consideration which moves the granting of the privilege, which may be revoked, annulled or amended at the pleasure of the legislature. Burroughs, p. 148, 392, 393.

It is true that whether pursued on land or on water, the calling itself is the same; but that in its exercise and results, one is different from the other, there can be no doubt; on water, the bar is entirely under the control of the officers of the boat, they can — according to circumstances — prevent or forbid the keeper from opening it, regulate or order its closing. Their interest is to check intoxication, restrain extravagant drinking and preserve quiet on the boat; on land it is otherwise; every one enters the coffee-house, and — far from restraining — the bar-keeper is generally disposed to encourage the abuse of intoxicating liquors, and often that abuse breeds disorder, violence and crime. Burroughs, 392, 393.

In its form, and in many of its effects, the bar-room on a steamboat is distinct from the bar-room on land, and as the State has the power of dividing into classes the objects of taxation, the distinction which exists between those bars, justifies the difference made in the price of the licenses. *City of New Orleans v. Kaufman*, 29 La. Ann. 283; S. C. 29 Am. Rep. 328.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed with costs.

STATE V. TILMAN.

(30 La. Ann. 1249.)

Criminal law — rape — of child under twelve.

A statute fixing the age of puberty in females at twelve; carnal intercourse with a female under that age is rape.

CONVICTION of rape. The opinion states the case.

F. B. Earhart, district attorney for the State.

Ed. N. Pugh, for defendant and appellant.

EAGAN, J. The defendant was convicted and sentenced for the crime of rape. He has appealed. The only question for our consideration is presented by a bill of exceptions to the charge of the judge that if the jury believe that the prosecutrix was under twelve years of age she was incapable of giving consent. In most of the States the age at which a female is deemed capable of giving consent in cases of rape has been fixed by statute. It is not so, however, in Louisiana. We are therefore left to the common law as it existed prior to 1805, and to such other sources of information as are afforded by the provisions of our law on kindred subjects.

Lord HALE, 1 Hale's P. C., says that all sexual intercourse with a child under twelve years, whether with or without her consent, is rape; and that the statute of Westminster, 1, which reduced all rape to a misdemeanor, referred to that period. Blackstone, vol. 4, p. 212, says, however, that law has generally been held only to extend to infants under ten. Greenleaf, vol. 3, § 211, says: "If the female was of tender age, the law conclusively presumes that she did not consent, and this age being not precisely determined in the common law was settled by the statute, 18 Eliz. c. 7, at ten years." In first East's, P. C., it was held that the statute providing for the punishment of persons having carnal knowledge of infants under ten, and reducing the punishment, rather created a new felony, other than rape, at common law, to the definition of which last offense force seems essential. Wharton's Am. Crim. Law, vol 1, § 58, fixes fourteen as the age at which infants are presumed to be able to dis-

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tinguish between good and evil, though they may be shown to be so much earlier. The same author (§ 61) says: "An infant under fourteen is *presumed* by law unable to commit rape, and therefore it seems cannot be guilty of it, and though in other felonies *malitia supplet aetatem in some cases*, yet it means as to this fact the law presumes him impotent as well as wanting in discretion. Nor is any evidence admissible to show that in fact he had arrived at the full state of puberty, and could commit the offense. Waterman's Federal Digest, p. 520, § 20, is to the same effect, except that evidence in rebuttal of the legal presumption may be received. In same, § 23, it is said that a female ceases to be a child and becomes a woman at the age of puberty, within the meaning of the statute of Ohio defining the crime of rape. There would seem to be no good reason in law for excusing the criminal under fourteen, both on the ground of incapacity and impotency, and yet holding that a female under the age of puberty is capable of giving consent to carnal connection. In the unsettled state of the law, and amid the conflict of authority, we think the safest rule is to look to its origin and reason. On this subject our own criminal code contains provisions which throw valuable light on the intentions and objects of the law-maker. Article 34 provides that as "age forms a distinction between those who have and those who have not sufficient reason and experience to govern themselves, and to be masters of their own conduct; but as nature does not always impart the same maturity and strength of judgment at the same age, the law determines the period at which persons are sufficiently advanced in life to be capable of contracting marriage and forming other engagements." Article 36 fixes the age of puberty at fourteen for males and twelve for females; and article 92 prohibits ministers of the gospel and magistrates entrusted with the power of celebrating marriages, from marrying any male under the age of fourteen years, and any female under the age of twelve years, under penalty, as to the magistrates, of being removed from office, and as to the minister, of being forever deprived of the right of celebrating marriages. We think the Ohio rule and that contended for by Sir MATTHEW HALE more in accordance with the reason and policy of the law, and especially of our own law, and in the absence of any adjudication, in this State to the contrary, we think there was no error in the charge complained of.

The verdict and sentence appealed from are therefore affirmed.

WHITE V. HEFFNER.

(30 La. Ann. 1280.)

Execution — exemption — partnership property.

A partnership is not within the language or intendment of the exemption law, and hence none of the property of a partnership is exempt from seizure on execution.*

INJUNCTION against execution. The opinion states the facts.

Hicks & Hicks, for plaintiffs and appellants.

Nutt & Leonard and *R. J. Looney*, for defendants and appellees.

MANNING, Ch. J. The plaintiffs enjoin the execution of a judgment in favor of G. W. Dillard for \$1,000 and interest, upon which there has been credited a payment of seventy-one dollars. The execution issued at the instance of Dillard's executrix, and the tutrix to his minor heirs, and seizure was made of "a power press, six cases of type, galleys, rules, five imposing stones, one desk, two stoves and pipe, three desks and one table."

The allegations of the injunction are that the plaintiffs are practical printers, and that the articles of property seized, worth \$2,000, are exempt from seizure because they are the tools and implements of their trade, and necessary to its exercise, by which they gain a living.

The plaintiffs compose a partnership, the business of which was formerly to print and publish a newspaper, and to do job work. White swears the daily newspaper had ceased to be published sixteen weeks before the seizure. Then it became a weekly, and that expired on thirtieth of June. In another place he says he commenced the weekly after the seizure. The seizure was made August ninth.

The firm continued to do job printing after the newspaper was no longer issued, and one of them testifies that the annual receipts from their entire business were \$3,000. The attorney, who ordered the seizure for Mrs. Dillard, seems to have been careful to instruct the

* To same effect, *Wiles v. Frey* (7 Neb. 134), 29 Am. Rep. 880, and references.

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sheriff not to seize the material of the job-office, but when that officer requested White to point out such things as belonged to that department, he refused to give him any assistance, and warned him that it was a government office he was entering, and he might get himself into trouble by seizing government property. It appears one of the firm was collector of the port there.

The fact appears to be that no portion of the materials seized belonged to either department exclusively, except, perhaps, the imposing stones. The press, galleys, most of the type, rules, were used indiscriminately for either the job work or the newspaper. A printing establishment in such a country town as Shreveport would not need two separate and distinct departments. The stoves would not appear to belong to any printing business.

Some testimony was taken as to the unprofitableness of the newspaper business in Shreveport, probably with a view of showing that the plaintiffs could not have made their living by it. But one of them has sworn to the amount of annual receipts, and also that they owed for rent and materials and paper. The lessor's claim is for \$850, the material-man's is \$220, and the amount of the debt for paper is unmentioned. It is very easy to see how one can support a family on a business as large as this is shown to be, when all the receipts are consumed at home, and none are applied to the payment of debts.

The claim of exemption of this property from seizure is based on article 644 of the Code of Practice, and we are referred to an express adjudication of this court on the nature and extent of the exemption so far as it applies to a printer. *Prather v. Bobo*, 15 La. Ann. 524.

It is not needful to say in this case whether we think a press and material for printing can properly or reasonably be included in those implements that are necessary for the exercise of a printer's trade or calling. If they are, ninety-nine hundredths of the printers are "exercising their calling" without the implements that are necessary to do it, and notwithstanding they "make a living." It is sufficient to say that the exemption is claimed here by a partnership, which is an ideal being, has no living to make, and is not within the language or intendment of the exemption law, which, being in derogation of the general law that all of a debtor's property is the common pledge of his creditors, must be construed strictly.

We are warmly urged to carry out in a liberal spirit the enlightened policy of modern legislation, which seeks to protect the citizen from

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pauperism. An enlightened policy, which teaches the citizen the weight of an obligation by enforcing its performance, cannot look without dismay at the spectacle of any debtor keeping secure in his grasp property not legitimately or necessarily included within the terms of the law which accords it to him. The abrasion of the moral sense of the general public, occasioned by frequently witnessing this successful defiance of just creditors, is a greater harm than the private suffering of an isolated individual here and there, and enlightened statesmanship looks only to the general good.

The judge below dissolved the injunction, with \$100 damages. His judgment is affirmed.

PERRET V. KING.

(30 La. Ann. 1368.)

Contract — to pay "outstanding liabilities" — damages for libel.

A stipulation by the vendee of a newspaper to pay "all of the outstanding liabilities" of the paper, will not make the vendee liable for the damages for libel subsequently recovered against the vendor, in a suit pending when the sale of the paper was made.

ACTION on contract. The opinion states the facts. The defendant had judgment below.

Labatt & Aroni and W. F. Mellen, for plaintiff and appellant.

Wm. O. Denégre and Chas. E. Schmidt, for defendant and appellee.

MARR, J. In March, 1869, the plaintiff, appellant, instituted suit against Charles A. Weed, the owner of the "New Orleans Times," a newspaper conducted by him, to recover \$10,000 damages for libel. There was a verdict and judgment in favor of the defendant in that suit. Plaintiff appealed; and in March, 1873, this court reversed the judgment of the district court, and awarded to plaintiff \$15,000 in damages against Charles A. Weed, proprietor of the newspaper styled "The New Orleans Times." 25 La. Ann. 170.

In December, 1872, Weed was indebted to Mrs. Alice King, his vendor, in a sum exceeding \$50,000, on account of the price of the

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"Times" establishment; and he owed other debts, one to J. H. McKee for \$7,000. On the thirteenth December, he sold the entire "Times" newspaper establishment to Mrs. King, with all the assets, in consideration of which Mrs. King assumed the payment of "all the outstanding liabilities of the said newspaper known as the New Orleans Times." She also agreed to pay the debt due to McKee, and to cancel and return Weed's three notes in her favor, owned and held by her, each for \$25,000, on one of which \$20,000 had been paid. This suit was brought to recover of Mrs. King the amount of the judgment in favor of plaintiff against Weed, with interest and costs, upon the allegation that it was one of the outstanding liabilities assumed by her in her agreement with Weed. In her answer Mrs. King, after general denial, and admission that she was the owner of the "Times," specially denied that she had ever "stipulated or contracted or agreed to assume the payment of plaintiff's claim against C. A. Weed."

There were objections taken and reserved to portions of the parol testimony offered on the trial, which it is not necessary to notice now. This testimony tended to show what liabilities Mrs. King had assumed. The agreement offered in evidence was a copy published in the "Times" newspaper. The original had been lost or mislaid; and it differed from the original only in that there was attached to the original a list of the liabilities to be paid by Mrs. King.

Prima facie, this assumption by Mrs. King would be limited to what the parties understood as debts incurred in and about the conducting of the paper. Mrs. King's object was, manifestly, to secure as far as she could, the large sum due to her on account of the price; and Weed's object was to rid himself of his personal liability for the debts which were acknowledged to be due, and which he desired to have paid. Whatever might be the amount so assumed by Mrs. King, it would diminish to that extent the net value of the establishment to her; and it would diminish the sum which would otherwise have been applicable to Weed's other debts, or to his other purposes, in the event that the value of the establishment was in excess of the debt due to Mrs. King.

It does not appear at what date, precisely, the verdict and judgment in favor of Weed were rendered; nor when the appeal was taken; but the case was pending on appeal in December, 1872, when Mrs. King became the proprietor. The proprietor of a newspaper,

sued for libel, would not rank that claim as one of his debts, nor would he, in disposing of his property, be inclined to reserve from the price a sum sufficient to cover such demand. He could not know, nor could the purchaser know, what amount might be awarded. The demand was for \$10,000, with interest from March, 1869, and costs; so that if the seller had understood, and the purchaser had understood, that such demand was to be treated as part of the price, and assumed by the purchaser, the amount reserved would have been in excess of \$10,000.

In this case there was a verdict and a judgment in favor of Weed, exonerating him from liability. The appeal did not set aside that judgment; and it would require very positive proof to show that either Weed or Mrs. King allowed this claim to enter into their estimation. Weed wished to pay what he considered his debts, liabilities. The books of the "Times" establishment showed the amount of the liabilities and of the assets; and an agent of Mrs. King had been in the office, "in possession of the whole newspaper, as the representative of Mrs. King," from the death of her husband. Weed desired to avoid being forced into bankruptcy. The "Times" establishment had been seized for the debt due McKee; and it was necessary to make some arrangement by which Mrs. King could be protected, and the threatened bankruptcy avoided. This agreement was the result of that condition of affairs.

If one should read the assumption clause in the agreement between Weed and Mrs. King, and the petition and answer in this case, and the decision of this court in March, 1873, as reported in 25 La. Ann. 170, his impression would be that a judgment against Weed, who had been the proprietor of the "Times" newspaper, for damages for a malicious libel, was not one of the outstanding liabilities of the "said newspaper" in December, 1872, when Mrs. King again became the proprietor. In libel suits the verdict of a jury in favor of defendant creates a very strong presumption of the absence of right to recover. The debts and liabilities of the newspaper, in general business parlance, would be construed to be such as created some legal or equitable right or lien upon the property, the types, presses, stock, etc., such as wages, sums due for paper and other materials and supplies, and the salaries of editors and writers. There was no lien or equitable right upon the property, more especially against the vendor, Mrs. King, in favor of the plaintiff, who had been injured in his feelings, perhaps in his reputation, by the

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malicious wrong of Weed; and the interpretation which would make Mrs. King liable to plaintiff in this case, on the assumption in her agreement with Weed, is not that which the language necessarily imports; nor is it either just or reasonable.

If the case be considered without reference to the testimony objected to, the pretensions of plaintiff would be so extraordinary that they could not be allowed. We think, however, it was competent to prove by the testimony of Green, who kept the books, who was Mrs. King's representative, and by Mr. Hunt, who, as her attorney at law and in fact, made the agreement with Weed in her behalf, that there was a list of debts, an estimation of the liabilities to be paid by Mrs. King, with reference to which this contract was made; and that the claim of plaintiff was not considered or taken into the estimation by either party.

The judge of the district court concluded that the liabilities of the newspaper, assumed by Mrs. King, in the absence of proof to the contrary, would be those arising *ex contractu*, not such as arose *ex delicto*; and this is our view of the law, and our interpretation of the agreement.

The judgment appealed from is, therefore, affirmed with costs.
Rehearing refused.

ALLEN v. MERCHANTS' MUTUAL INSURANCE COMPANY.

(30 La. Ann. 1386.)

Insurance — double — subsequent policy void.

Where, in a contract of insurance which covers a storehouse and the goods therein, it is stipulated that should the assured subsequently take out a policy in any other company the assurers should receive notice of it on pain of forfeiting their policy, a subsequent assurance of the house or the goods in another company, without notice to the assurers, will work the forfeiture of the contract with them, whether the subsequent contract was legally enforceable or not.*

ACTION on policy of fire insurance. The opinion states the facts.
The plaintiff had judgment below.

* *Contra*: *Hubbard v. Hartford Fire Ins. Co.* (33 Iowa, 325), 11 Am. Rep. 125; *Thomas v. Builders' Fire Ins. Co.* (119 Mass. 121), 20 Am. Rep. 817, and note, 819; *Knight v. Eureka Ins. Co.* (24 Ohio St. 664), 20 Am. Rep. 778; *Lindley v. Union Ins. Co.* (65 Me. 368), 20 Am. Rep. 701; *Sutherland v. Old Dominion Ins. Co.*, 31 Gratt. 176.

Allen v. Merchants' Mutual Insurance Company.

Isaiah Tharp, for plaintiff and appellee.

A. & W. Voorhies and *Horner & Benedict*, for defendants and appellants.

MANNING, Ch. J. This is an action upon a policy of insurance against fire. The claim is for \$6,000 on a stock of furniture in the frame slated store on the corner of Magazine and Sixth streets, and \$1,000 on furniture in a frame slated warehouse in its rear.

The defendant pleads, in bar of recovery, that the policy is vitiated by the violation of that clause requiring written notice to be given it of insurance in other companies, and avers that the plaintiff insured the same property in the Lafayette Insurance Company and failed to give notice thereof to the defendant.

The policy contains this clause: "And provided, further, that in case the insured shall have already any other insurance against loss by fire on the property hereby insured not notified to this corporation, and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect; and if the said insured or his assignees shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this corporation and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease and be of no effect."

The policy is dated November 22, 1871, and was renewed every year to the same date, 1874. On February 13, 1874, the plaintiff assigned his right in the policy to Mrs. Balser to the extent of \$1,180, which the company approved, and the suit is to recover her interest as well as the plaintiff's. On July 18, 1874, the plaintiff insured in the Lafayette company, for two months, for \$2,000, and the property is described in that policy as "stock of ready-made furniture contained in the two-story frame slated building situate on south-east corner of Magazine and Sixth streets."

The law upon the vitiation of a policy of insurance for non-compliance with the condition quoted above is well settled. The elementary writers are in accord upon it, and the point has been several times adjudicated by this court. 1 Phill. Ins. 420; *Walton v. La. Ins. Co.*, 2 Rob. 563; *Battaille v. Merch. Ins. Co.*, 3 id. 384; *Leavitt v. West. Ins. Co.*, 7 id. 351.

It was attempted to be proved that the plaintiff did not know of

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this provision in the policy; but he ought to have known it. He had the opportunity to know it. The clause is printed like other parts of the policy, and his negligence in not reading it is the only cause of his ignorance of its stringent provision. He agreed on his part to comply with that stipulation as fully as he agreed to pay the premium, and is now barred from recovery for failure to do so. When he calls upon a court to compel the company to fulfill its part of the obligation he must show that he has fulfilled all the conditions into which he entered.

The plaintiff insists that the rule of vitiation of policy for want of notice of other insurance does not apply here because he had brought suit against the Lafayette company without success (for misdescription of policy); and as that contract cannot be enforced it should not constitute a breach of the one he is now trying to enforce. But the clause of the policy set up against him is, not that if he should attempt to make an enforceable contract with other insurance companies and should fail in so doing, his contract with the defendant should be at an end, but it forbade him to insure elsewhere absolutely without giving notice and obtaining consent.

He also urges that there were two separate risks, one on the furniture in the corner store and the other on that in the warehouse, and his insurance in the Lafayette company was on one only of these and cannot, therefore, affect the other. There was but one policy issued by the defendant, and the stipulation covering subsequent insurance applied to the property as a whole, and that was that the insurance then effected should not be good if the plaintiff afterwards effected any other "on the property hereby insured."

We are not disposed to think the plaintiff has acted fraudulently. His insured stock is proved to have been worth much more than the amount of his insurance. Like *Leavitt's* case, in 7 Rob., it is one of hardship, but the plaintiff can only blame himself that he did not inform himself fully of all the conditions of the policy. The clause in question is one of the most usual conditions of insurance policies, or rather it is inserted in all of them.

There is error in the judgment of the lower court, and therefore it is ordered, adjudged and decreed that that judgment is avoided and reversed, and that there be now judgment in favor of the defendant against the plaintiff upon his demand and for costs.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MAINE.

PARSHLEY V. HEATH.

(69 Me. 90.)

Negotiable instruments — waiver of demand and notice.

A payee of a negotiable note indorsing it under a waiver of demand and notice, all subsequent indorsers are deemed to assent to the same waiver, in the absence of any contrary provision.

ACTION against executor of deceased, second indorser of a note.
The opinion shows the facts.

J. Crosby, for plaintiff.

E. F. Webb, for defendant.

BARROWS, J. Since the passage of the statute of 1868, chap. 152, now embodied in R. S., chap. 32, § 10, no waiver of demand and notice by an indorser of any promissory note or bill of exchange is valid unless it is in writing, signed by such indorser or his lawful agent. The note here sued bears the following indorsements:

“Waiving demand and notice, C. B. Mahan, agent, Granite Agricultural Works, Lebanon, N. H.

“S. HEATH”

We think that where the first indorser of a piece of negotiable paper, instead of restricting his written waiver of demand and notice

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to himself, uses language which may fairly be understood to apply to all the successive parties, those who merely append their naked signatures beneath his must be held to adopt the written waiver and be bound by it. Writing such a waiver above his own signature by an early indorser, without the knowledge and consent of subsequent indorsers, has been held in this State to be a material alteration of their contract which vitiated it altogether. *Farmer v. Rand*, 14 Me. 225.

If either indorser desired to make his contract differ from that which a natural construction of the words preceding his signature would import, it would be easy for him to exclude himself from their operation by placing before his own signature the words "requiring demand and notice," or something equivalent. If he neglects this, the fair presumption is that he intends to adopt the language of the previous signer and make the same contract.

If it should be regarded as competent for the indorser, upon the strength of certain decisions touching the character of the contract evidenced by a blank indorsement, to go into parol evidence to rebut the presumption naturally arising from the appearance of his signature under such an indorsement, this case is barren of any testimony tending that way. On the contrary, if parol evidence on the point is admissible to reinforce the presumption, it is clear that a man of the known and approved probity and intelligence of Solyman Heath never would have held such language as he did to the plaintiff, to induce her to receive the note for his accommodation, unless he fully intended to adopt the waiver and make himself and his estate holden for the note, provided the plaintiff had it at the place where it was payable when it fell due, and the maker failed to pay.

Judgment for plaintiff for the amount of the note, and interest from September 4, 1875.

APPLETON, Ch. J., WALTON, DANFORTH, PETERS and LIBBEY, JJ. concurred.

BERRY v. PULLEN.

(89 Me. 101.)

Surety — oral agreement to extend time of payment.

An oral agreement for the extension of the time of a principal to pay a note will not discharge a surety on the note.*

ACTION on a promissory note, against principal and surety. The evidence showed that the payee orally agreed with the principal to extend the time of payment so long as he would pay eight per cent interest. The defendant had judgment below.

E. W. Whitehouse, for plaintiff.

S. & L. Titcomb, for defendant.

VIRGIN, J. Probably no principle has ever been, in substance, more frequently repeated by courts than that a surety is entitled to have his contract performed according to its terms; and that if any alteration, either in substance or time of performance, is made therein, without the surety's consent, by parties knowing his relation to it, he thereby becomes absolved from all further liability thereon.

The rights and liabilities of sureties are well defined. Whether or not a note, executed by two makers, discloses the fact that one of them is a surety for the other, their respective liability to the payee finds expression in the terms of the note — each being alike liable to pay it according to its tenor. Moreover, it is not only the legal duty of the surety to pay the note at its maturity, but it is also his legal privilege to do so, for then he may at will seek indemnity from the principal. For whenever the surety has paid the note to the holder, he has the right forthwith to sue and recover it of the principal, in an action at law, and be subrogated to all the rights of the holder in equity, among which is a suit by the latter against the principal. If therefore the holder has by any act precluded or

* To same effect, *Howell v. Sevier* (1 Lea. 360), 27 Am. Rep. 771.

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estopped himself from demanding payment of the principal, or has entitled the principal to claim exemption from payment during a single day beyond the time of the maturity of the note, his rights and remedies thereby become prejudiced, and he is thereby discharged. For while it is the privilege of the surety to become subrogated to the rights of the holder by paying, that is the extent of his rights. Therefore if the holder has bound himself, without reservation, not to receive payment from the principal, the latter may enjoin him from receiving it from the surety, who will thereby be prevented from asserting his legal and equitable rights against the principal, and consequently be discharged.

One of the most common modes by which creditors let sureties off from their liability, is by giving time to their principals. Thus, if the holder of a promissory note, knowing one of the makers to be a surety for the other, agrees with the principal, without the knowledge and consent of the surety, to enlarge the time of payment thereof, even for a day, the surety's liability is thereby terminated. Mere gratuitous forbearance of whatever duration inside of the limitation bar, will not discharge, for it is not the forbearance, but the contract which operates the discharge. *Page v. Webster*, 15 Me. 249. But before a surety, whose name was deliberately and understandingly placed upon a note to give it credit, can be thus absolved from liability, the law, as well as justice and equity, requires that there shall be a valid, binding contract, one founded on a sufficient consideration, and the effect of which shall be to give further definite time to the principal, without the consent of the surety.

The matter of consideration and time in such contract is copiously illustrated by a large number of cases, English and American, collated in the notes to Lead. Cas. Eq. under *Rees v. Berrington*, pp. 1867 *et seq.*, and Brandt on Sur. and Guar. chap. 14, 401 *et seq.*

Thus, it is said, the true question is whether the agreement to give time, or to vary the contract in any other particular, could have been enforced against the creditor, or as a cause of action. *Draper v. Romeyn*, 18 Barb. 166; approved in *Wheeler v. Washburn*, 24 Vt. 293; *Turrill v. Boynton*, 23 id. 142; *Greeley v. Dow*, 2 Met. 176.

Again the test is expressed a little differently, being whether the creditor would have made himself liable to the principal by proceeding against him immediately after giving the promise of forbearance; for if he would not, the legal relation of the parties is unchanged, and there is no equitable ground for exoneration of the

surety, and therefore there can be no discharge. *Lead. Cas. supra*; *Leavitt v. Sanage*, 16 Me. 72.

“By a valid agreement to give time,” say the court in *Veazie v. Carr*, 3 Allen, 14, “is meant an agreement for the breach of which the maker has a remedy either at law or in equity.” And the authorities generally concur in holding that the requisites of a valid agreement are essential, otherwise the creditor is not bound, and the rights of the parties not changed; and if not changed, the original contract is in force and may be performed.

There are numerous cases above referred to, holding that while the absolute payment by the principal and acceptance by the creditor of usurious interest is a good consideration for an enlargement of the time of payment, an executory contract to pay such interest is not, and that therefore it will not absolve a surety. Among the cases in point is the early, well-considered case of *Tudor v. Goodloe*, 1 B. Mon. 322. See, also, *Vilas v. Jones*, 10 Pai. 80; *Burgess v. Dewey*, 33 Vt. 618; *Smith v. Hyde*, 36 id. 303; *Myers v. First Nat. Bank*, 78 Ill. 257. In a word, all concur in holding that the contract must be binding to effect the release. This rule must exclude oral contracts which the statute of frauds requires to be in writing. And so it has been expressly held. Thus, where the executrix of the acceptor of a bill of exchange orally promised to pay the holder out of her own estate, provided he would forbear to sue, and he did forbear in consequence, it was held that the drawer was not discharged, the promise being within the statute of frauds. *BEST, Ch. J.*, said: “If the promise made by the executrix be considered a promise to pay the debt with interest out of the assets, it gave no claim to the holder beyond what the bill gave him * * * If it is to be taken to be a personal promise of the executrix, it is void under the statute of frauds, not being in writing.” *Philpot v. Briant*, 4 Bing. 717.

To the same point is *Agee v. Steele*, 8 Ala. 948; the promise there being within another section of the statute of frauds — one relating to an interest in land.

The application of these rules to the facts in the case at bar is decisive of the case in favor of the plaintiff. The principal (Pullen) is the witness who testified to the agreement. His testimony on this point is, in brief, that a short time after the note was due he saw the plaintiff, when the plaintiff told the witness that the note was due and wanted to know what he wanted to do about it. Witness

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answered, "I told him I hadn't the money. He told me that if I would give him eight per cent I might have that money. Said he, you can have it as long as you want it. I told him I would do it."

The intention of the parties, as shown by this testimony, is that from that time forward, so long as Pullen kept the money, he should pay eight per cent interest. If the agreement had been reduced to writing and signed it would have been a valid contract and one which could be enforced; and as the parties then would have substituted another contract for the original, without the knowledge or consent of the defendant, he would have been discharged. But the contract not being binding, the rights of the parties were in nowise changed and the surety would not be thereby discharged. The verdict being against law must be set aside.

Verdict set aside.

APPLETON, Ch. J., DANFORTH, PETERS and LIBBEY, JJ., concurred.

 BELL V. PACKARD.

(69 Me. 105.)

Contract — lex loci — married woman — promissory note.

A note written and dated in Maine, but signed in Massachusetts by the wife of a citizen of that State, as surety for her husband, and returned by mail to the payee in Maine, is a Maine contract, and is enforceable in Maine although void by the laws of Massachusetts.*

ACTION on a promissory note. The opinion states the facts.

James Bell and E. O. Bean, for plaintiff.

E. F. Webb, for defendant.

The contract was made in Massachusetts, and should be interpreted by the laws of that Commonwealth, where the defendant resided when they signed the note. The note was payable in law at Cambridge. *Duncan v. Topham*, 65 E. C. L. 225; *Levy v. Cohen*, 4 Ga.

* To same effect, *Muliken v. Pratt* (125 Mass. 374), 28 Am. Rep. 241.

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1; 1 Pars. on Cont. 407; *Dunlop v. Higgins*, 1 H. of L. Cas. 381; *Duncan v. Topham*, 8 C. B. 225; 2 Pars. on Cont. 95; *Merchant v. Chapman*, 4 Allen, 364; *Hunter v. Wright*, 12 id. 550 *Vassar v. Camp*, 11 N. Y. 441; *Western v. Genesee Mut. Ins. Co.* 12 id. 258; *Sands v. Smith*, 1 Neb. 108; *McIntyre v. Parks*, 3 Met. 207; *Tayloe v. Insurance Co.*, 9 How. 390. It must be interpreted according to the law of the place where made. *Lindsay v. Hill*, 66 Me. 212; Gen. Statutes of Mass., chap. 108, § 3; *Athol Machine Co. v. Fuller*, 107 Mass. 437; *Willard v. Eastham*, 15 Gray, 328; *Heburn v. Warner*, 112 Mass. 271; *Burns v. Lynde*, 6 Allen, 313.

VIRGIN, J. On or before March 12, 1873, the plaintiff, a resident of Skowhegan, holding an overdue note against the defendant's husband, then a resident of Cambridge, Mass., wrote the note in suit and inclosed it in a letter addressed and mailed to the latter in Cambridge, therein agreeing to surrender the old note upon the delivery of the new one signed by him with a good surety. Accordingly the new note was signed by the defendant's husband and herself and mailed to and received by the plaintiff at Skowhegan; who thereupon inclosed the old note to Packard at Cambridge.

The case also finds that when the note was signed by the defendant, she was a married woman; and that by the law of Massachusetts she could not thus bind herself there.

In this State, however, a married woman may contract for any lawful purpose. R. S., chap. 61, § 4.

Upon these facts the principal question for determination is, where was the note in suit made or to be paid? For although the personal incompetency of the defendant to contract as surety for her husband in Massachusetts, will, so far as all such contracts made there are concerned, follow her everywhere, still it will not be regarded as to such contracts made or to be performed here, where no such disqualification is acknowledged. *Polydore v. Prince*, Ware, 402; Story Conf. of Laws, §§ 101, 102.

Our opinion is that the note was made and intended by the parties to be paid in Skowhegan. For although it was signed in Cambridge, it was delivered to the payee in Skowhegan; and it was not a completed contract until delivered. This proposition needs no citation of authorities, still we cite *Lawrence v. Bassett*, 5 Allen, 140, as precisely in point.

But even if this were not conclusive, we should have no hesitation

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in deciding that the construction and legal effect of the note declared on must be determined by the laws of this State, on the ground that no contract must be held as intended to be made in violation of the law, whenever by any reasonable construction it can be made consistent with the law, and which it was competent for the parties to adopt. Story Conf. of Laws, § 305 *a*.

The plaintiff's letter called for a "good surety" to the note. By the execution and delivery of it, the makers must be presumed to have intended a *bona fide* and not a *mala fide* compliance with the proposition. But if the note was made in Massachusetts, and intended to be payable there, then it was illegal and void and an intended fraud by the makers, since they must be presumed to have known the law of their domicile; whereas if made or intended to be paid in this State, it would be legal and valid. It should, therefore, in the absence of any legal principle forbidding it, be considered as intended by the parties to have been made with reference to the law of the place where legal.

Judgment for the plaintiff for the amount of the note.

APPLETON, Ch. J., DANFORTH, PETERS and LIBBEY, JJ., concurred.

DAVIDSON V. CITY OF PORTLAND.

(89 Me. 116.)

Sunday — defective highway — contributing cause of injury.

Where one walking on the Lord's day for exercise went into a beer shop and drank a glass of beer and on resuming his walk was injured solely by a defect in the highway, *held*, that he might recover.

ACTION for damages. The plaintiff walked out for exercise in a city on Sunday, and going into a store drank a glass of beer. On resuming his walk he slipped and fell on a ridge of ice on the sidewalk, injuring himself. The judge charged as follows:

"Suppose a man was traveling on Sunday to visit the sick for purposes of charity, that would be for a legal purpose. Suppose, as he was driving along for that purpose, he should come to a tavern and should subsequently form the purpose of going in and purchasing liquor. Suppose he did go in, purchase the liquor, drink it, return

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to the carriage, resume his journey to visit the sick and subsequently should be injured. I see nothing in that case to prevent him from recovering, that is, assuming that his use of the liquor did not contribute to produce the injury. I am putting this illustration merely with reference to the Sunday law.

“That would be a case where a man started with a lawful purpose, proceeded up to a certain point, then formed an unlawful purpose which he executed, then returned to the point where he left his original lawful journey and went on with that. The only way in which the unlawful act or unlawful purpose affects his journey is in the matter of time; the going in and coming out would affect it in the matter of time, but for the purposes of this case I should say the plaintiff would be entitled to recover so far as that consideration was concerned.”

“If a man is walking for exercise in the open air, and while pursuing that walk goes into a shop for the purchase of liquor, comes out, resumes his original walk, not varying his walk except so far as it varies in point of time, I think that fact does not prevent his recovering.”

The plaintiff had judgment.

W. L. Putnam, for plaintiff.

H. B. Cleaves, city solicitor, for defendants, contended that the doctrine of *O'Connell v. Lewiston*, 65 Me. 34; S. C., 20 Am. Rep. 673, should not be extended, and cited *Dennett v. Pen. Fair Grounds*, 57 Me. 425; S. C., 2 Am. Rep. 58; *Towne v. Wiley*, 23 Vt. 355; *Lewis v. Littlefield*, 15 Me. 233; *Hall v. Corcoran*, 107 Mass. 251; S. C., 9 Am. Rep. 30; *Morton v. Gloster*, 46 Me. 520.

APPLETON, Ch. J. Walking on the Sabbath for exercise in the open air is not against the statute, chap. 124, § 20. This is what the plaintiff did, as the jury have found, and nothing more. *O'Connell v. Lewiston*, 65 Me. 34; S. C., 20 Am. Rep. 673.

Stepping aside while walking for a glass of beer may have been a violation of law. If it was, and it had nothing to do with causing the accident, it offered no excuse for a defective highway. To exonerate the city from liability it must appear that the plaintiff's violation of law contributed to the accident. *Norris v. Litchfield*, 35 N. H. 271; *Baker v. Portland*, 58 Me. 199; 4 Am. Rep. 274. The jury found it did not.

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Whether the road was defective, and whether the defect was the sole cause of the injury, was submitted to the determination of the jury and the parties must abide their judgment.

We find no sufficient cause for disturbing the verdict.

Exceptions and motion overruled.

WALTON, BARROWS, VIRGIN and LIBBEY, JJ., concurred.

GILMORE v. WOODCOCK.

(69 Me. 118.)

Betting and gaming — action to recover stake after notice not to pay.

Money held by a stakeholder on a bet may be recovered by the depositor, provided he notifies him before delivery of the stakes not to pay it over.*

ACTION for money deposited as a stake, and demanded by the depositor of the stakeholder before he had paid it over to the winning party. The plaintiff was nonsuited.

W. H. McLellan, for plaintiff.

Thompson & Dunton, for defendant. The statute against betting or wagering on the result of any election is penal and should be strictly construed. *Beals v. Thurlow*, 63 Me. 9; Esp. on Pen. Stat. chap. 1. The clause in the sixty-ninth section, Revised Statutes, chap. 4, "under penalty of forfeiting," prescribes the condition under which the parties made the bet or wager, to wit: the loss of the money or property bet or wagered.

BARROWS, J. It was long ago settled in this State that all betting is illegal; yet the losing and therefore penitent gamester has never been denied a remedy, either by the courts or the legislature. It seems to have been thought that his folly and ignorance were sufficiently punished by the direct penalties to which he was liable, and by his being compelled to base his claim to retrieve his loss upon

* To same effect, *Gregory v. King* (58 Ill. 100), 11 Am. Rep. 56, and note, 58; *Wilkinson v. Tinsley* (16 Minn. 290), 10 Am. Rep. 180.

grounds generally regarded as derogatory both to his honor and his understanding.

It is plain that there can be no legal objection to permitting a party to an illegal transaction to withdraw from it while it is still incomplete. Hence the stakeholder has been held liable to the loser for the money deposited in his hands, where he has been notified by him not to pay it over to the winner at any time before it was actually paid, even though the stakeholder was an infant, his infancy being held not to be a bar to an action of trover for the wrongful conversion of the plaintiff's money under such circumstances. *Lewis v. Littlefield*, 15 Me. 233.

Nor does it make any difference in such case that the notice to the stakeholder and demand upon him for the money were subsequent to the happening of the event on which the wager depended. *Stacy v. Foss*, 19 Me. 335.

It is true that when the money has once been paid over to the winner, it cannot be recovered, unless a remedy is given by statute. But that is not this case. Betting on elections is declared illegal by Revised Statutes, chap. 4, § 69. It is placed on the same footing with other gambling, and is certainly not less mischievous.

Under the original statute (chap. 172, approved April 16, 1841) the parties betting each forfeited "a sum equal to" the wager, to the use of the city or town where he resided, to be recovered by an action of debt in any court competent to try the same. No transformation which the statute has undergone in the process of revision indicates any intention on the part of the legislature to change the substance of the forfeiture, though the form of action has been changed to case. It is not merely the identical money wagered which may be pursued; it might not always be possible to identify or trace it. The action by the city must, in any event, be brought within a year, according to the provisions of Revised Statutes, chap. 81, § 90, and it must be against a party making the bet. The liability of the plaintiff to a judgment in favor of the city against him for an equivalent amount cannot affect his right of action against the stakeholder, when it does not appear that the fund has been in any way impounded in the stakeholder's hands to meet the city's judgment. Unless the necessary legal steps have been taken to enforce a forfeiture, a man whose money or property is liable to forfeiture under the law, is still entitled to all the remedies that the law gives him for the protection of his rights in it.

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It is no part of the duty of the stakeholder to enforce the penalty in favor of the city, nor can he avail himself of the plaintiff's liability to the city as a defense to this action, upon any testimony here developed.

Exceptions sustained. Nonsuit set aside. New trial granted.

APPLETON, Ch. J., WALTON, DANFORTH, PETERS and LIBBEY, JJ. concurred.

STATE V. GILMAN.

(69 Me. 163.)

Criminal law — assault with intent to kill — aiming at one and wounding another.

One discharging a gun into a crowd intending to kill A, but missing him and wounding B, is guilty of assault with intent to murder.

An assault with intent to kill cannot be justified in defense of property.

CONVICTION of assault with intent to kill. The opinion states the case.

E. F. Webb, county attorney, for the State.

E. F. Pillsbury, R. Foster and W. P. Whitehouse, for defendant.

APPLETON, Ch. J. This is an indictment charging the defendant, in the first count, with an assault upon one John Flood with a dangerous weapon with intent to kill and murder; in the second count with an assault to kill, and in the third count with an aggravated assault.

The assault in question was made by deliberately discharging a loaded gun into a crowd by which Flood was wounded.

I. The counsel for the defendant requested the following instruction to be given: "That it is incumbent upon the government, in order to sustain the charge under the first and second counts in the indictment, to prove, beyond a reasonable doubt, that the specific intent there charged actually and in fact existed in the mind of the defendant at the time he committed the act; that it is incumbent upon the government, if it would establish an intent to kill, to

prove, beyond a reasonable doubt, that at the time he committed the act the defendant in fact intended and designed to take life."

The court instructed the jury that it was incumbent upon the State, before it could ask a conviction, to prove the guilt of the accused beyond a reasonable doubt.

The court further, on this branch of the case, instructed the jury as follows: "Had he the intent to kill and murder in making the assault? This is the great element in the first and second counts, because, as to both of these counts, if there was no intent to kill, then the crime charged on the prisoner in those counts is not made out. It is incumbent upon the State to prove, that the prisoner in fact intended to kill John Flood, under the rule that I shall give you."

This instruction includes the "specific intent" as in fact existing in the mind of the defendant, and embraces all the elements of the request.

II. The defendant's counsel requested the presiding justice to instruct the jury that if the defendant in fact intended to kill Noyes no presumption arises from that fact that he intended to kill John Flood.

Instead of such instruction, the following, which constitutes the basis of the defendant's complaint, was given:

"It is maintained by counsel that if he (the defendant) had an intent to kill Mr. Noyes, and discharged the gun and the gun took effect upon Mr. Flood, that the intent to kill Mr. Noyes is not sufficient to constitute the crime charged against the prisoner of intent to kill Mr. Flood. Upon this point in the case I instruct you that if the prisoner in discharging the gun intended to kill Mr. Noyes or any other person, any one of those assembled there on that occasion, and the charge which he fired from the gun took effect upon Mr. Flood, that is sufficient to constitute the offense with which he is charged. The intent to kill characterizes the act, goes with it, and if the blow reaches any person it carries with it the criminal intent to kill and murder; and if it takes effect upon a person other than the one intended, the crime is made out precisely the same as though the intention had been to kill and murder the person hit, precisely as if death had ensued from the wound inflicted. Though the intention of the party was not to kill the person hit, still if his intention was to kill any person by a murderous assault, and the blow takes effect upon a person other than the one intended, it is sufficient to

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constitute the crime of murder if death ensues, and it is sufficient to constitute the crime charged in the indictment if death does not ensue.

"The intent charged in this indictment is an intent to murder, and to establish that essential element in the case, it is necessary that the State proves to your full satisfaction that the prisoner in making the assault charged upon him intended to kill John Flood; intended to murder him, and that embraces the element of malice aforethought."

Here is the case of a man firing a loaded gun deliberately into a crowd. The ruling is that if intending to "kill Mr. Noyes or any other person, any of the persons assembled there," and the shot took effect upon Flood, the offense, as charged, would be established. "Where a blow aimed at one person lighteth upon another and killeth him it is murder. Thus A having malice against B strikes at and misses him but kills C, this is murder in A; and if it had been without malice, and under such circumstances that if B had died, it would have been but manslaughter; the killing of C, also, would have been but manslaughter." Whar. Am. Crim. Law (4th ed.), § 965. "If a man designing to kill another kill by mistake a third, the killing of such third person is murder." Id., § 997. If intending to murder A, and supposing B to be A, a person shoots at and wounds B, he may be convicted of wounding B with intent to murder him. A question arose as to the propriety of the conviction under such circumstances. "This conviction is good" remarks JERVIS, Ch. J. "There is no doubt," says PARKE, B., "but the prisoner intended to hit Taylor, but he mistook the particular person." *Regina v. Smith*, 33 E. L. and Eq. 567. In *State v. Butman*, 42 N. H. 490, BELL, Ch. J., in delivering the opinion of the court, says: "If the evidence shows an intent to kill under such circumstances as to constitute a murder if death had followed, the party may be convicted of an assault with intent to murder." In *Walker v. State*, 8 Ind. 290, the judge charged the jury that "if the defendant fired into the crowd in question, of which A, the prosecuting witness, was one, with the deliberate intention, either formed at the time or previously, of killing and murdering some one of the crowd and that A received a portion of the shot and contents of the gun and was wounded thereby, it will be sufficient to establish the assault and battery with the intent charged." This instruction was held to be sound law.

Had death ensued in this case, there can be no question that the prisoner would have been guilty of murder, whether he killed Noyes, whom he intended to kill, or Flood, whom he did not intend to kill, but whom he did kill.

III. The court were requested to give the following instruction: "The principle of law that every person is presumed to contemplate the ordinary and natural consequences of his own acts is applicable to cases where death actually ensues; if death does not ensue then there is no presumption of law, arising from the act alone, that death was intended, and if no consequences at all follow the act, there is no presumption of law that any consequences at all were intended."

Upon the question of intent the instruction was, that "a sane man must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts, and if one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended to destroy such person's life. Upon this branch of the law I do not say to you that there is a presumption of law when one discharges a loaded gun at another that he intended to kill. But the rule is that he who discharges a gun must be presumed to intend the natural and ordinary consequences of the act. You can only get at his motives by his act."

The intent precedes and modifies the act. The intent, if criminal, none the less exists, though the act intended fails, by mischance, of its accomplishment. It is the intent which determines the criminality of the act. If A intends to murder B, but the shot slightly wounds, the criminal intent none the less exists, and the assault with the intent to murder is established. So, if the shot intended to murder B hits C, the same result follows. If, when death does not ensue, the presumption is declared to be that death was not intended because death did not ensue, no one could be convicted of an assault with intent to kill. Because the shot does not take effect, though fired with ever so deadly an intent, it does not follow that the natural and ordinary consequences of the act were not intended. The presumption arises from the act and the intention of the act, not from what was accomplished or what failed of accomplishment.

IV. The assault in question was made for the purpose of expelling Noyes and others from the land claimed by the defendant's mother, Noyes claiming title thereto.

The court instructed the jury that it was for them to determine

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whether the weapon used was a deadly weapon, and if it was, that the prisoner had no right to use it for the purpose of expelling Flood from his mother's land, if he was on her land.

The law was correctly stated. It was left to the jury to say whether the weapon was a deadly one. The law is well settled that "an assault with intent to kill cannot be justified on the ground that it was necessary for the defense of property. The law, in this respect, must be the same as in homicide. If there is an aggression — a going out of the house for the purpose of attack — self-defense ceases." Whar. Am. Crim. Law, § 1284. An assault with intent to kill cannot be justified on the ground that it was necessary for the protection of the property. Russell on Crimes, 663.

V. The third, fourth and fifth requests do not seem to have been much relied upon. They are sufficiently answered by the remarks of the judge that he did not say there was a presumption of law that where one man discharges a loaded gun at another he intended to kill. The inference from the act is for the jury. The instruction is, "that the man who discharges the gun must be presumed to intend the natural and ordinary consequences of his act." What those may be, and what may be the intent as shown from the act, was what the jury were to determine, and what was properly submitted for their determination.

Exceptions overruled. Judgment on the verdict.

WALTON, BARROWS, PETERS and LIBBEY, JJ., concurred. VIRGIN, J., did not concur.

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PARKER v. PORTLAND PUBLISHING CO.

(89 Me. 173.)

Negligence — dangerous premises — licensee — evidence — contributory neglect.

One owes no duty to a mere licenser to keep safe his premises.

In an action of damages for negligence in lighting a passage-way and guarding an elevator, evidence of former accidents or escapes from accident is incompetent.

Every person, whether a mere licensee, or upon express or implied invitation, seeking access to a place of business is himself bound to use ordinary care.*

ACTION for negligence. The opinion states the facts. The plaintiff had judgment.

S. C. Andrews, A. A. Strout and G. F. Holmes, for plaintiff.

T. B. Reed, for defendant.

APPLETON, Ch. J. This is an action on the case for negligence.

The defendants had their counting-room on Exchange street, on the lower floor. The editorial and composing rooms were on the second floor. At the head of the stairs is a hall, on the right hand is the door leading to defendants' rooms, and on the left is an elevator-way with folding doors.

The plaintiff, as he alleges, on the 17th of September, 1875, between 11 and 12 o'clock at night, was proceeding to the defendants' rooms on the second floor, the counting-room being closed, for the purpose of procuring the insertion of a notice in the newspaper published by them, when, there being no sufficient light in the hall, and the doors to the elevator-way being left open, he fell down the elevator-way and was seriously injured.

The question for determination was whether there was negligence on the part of the defendants, at the time when and the place where the plaintiff sustained the injury for which he seeks compensation; not whether there was negligence at other times and under different conditions. If the defendants are liable, they are not liable for past

* See note, 26 Am. Rep. 592; *Nash v. Minneapolis Mill Co.*, post

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neglects, when an injury might have occurred but did not. Nor do previous omissions of duty prove, or tend to prove, the particular neglect of which the plaintiff complains.

I. Evidence, embracing a period of two years, tending to show at different times the condition of the hall-way and entrance to the Press editorial and composing rooms, as to light — whether more or less, or none — of the position of the elevator gate and doors, of what had happened to other men at other times, and of their fortunate escape from peril, was received, notwithstanding the seasonable and strenuous objections of the defendants.

These facts were all collateral to the main issue, and should have been excluded, “and the reason is, that such evidence tends to draw away the minds of the jury from the point in issue, and to excite, prejudice and mislead them; and moreover, the adverse party, having no notice of such a course of evidence, is not prepared to rebut it.” 1 Greenl. Ev., § 52. “It may be added, that the evidence not being to a material point, the witness could not be indicted for perjury if it were false.” 1 Greenl. Ev., § 448.

It was immaterial to the issue, whether, on some particular day or night previous to the plaintiff's injury, the gates to the elevator had been closed or not; whether there had been sufficient light in the hall or not, or whether some individual had or had not been exposed to injury and had escaped. If evidence of this character is receivable, contradictory proofs would be admissible, and there would be as many collateral issues as there were collateral facts and witnesses testifying to them.

The entire weight of judicial authority is against the reception of the evidence received subject to objection. The attention of the jury would be diverted from the questions really in dispute, and directed to what is entirely collateral. *Hubbard v. A. and K. Railroad Co.*, 39 Me. 506; *Aldrich v. Pelham*, 1 Gray, 510; *Kiddler v. Dunstable*, 11 id. 342; *Collins v. Dorchester*, 6 Cush. 396; *Gahagan v. B. and L. R. Co.*, 1 Allen, 187; *In re Baltimore and Susquehanna R. Co., v. Woodruff*, 4 Md. 242; *Schoonmaker v. Wilbraham*, 110 Mass. 134. “The evidence of what had happened at the same place the year before,” observes GRAY, Ch. J., in *Blair v. Pelham*, 118 Mass. 420, “was rightly rejected; because it tended to raise a collateral issue; because, it being admitted that the highway had been in the same condition for twenty-four hours before the injury now sued for, the previous length of time for which it had existed was immaterial.”

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The case of *Edwards v. Ottawa Riv. Nav. Co.*, 39 Up. Can. Q. B. 264, was an action against the defendant for negligence in the construction and management of their steamboat, by which sparks escaped from the funnel at the wharf, and the plaintiff's lumber and mills were burnt. The alleged negligence consisted in leaving the screens of the steamer open; and on the part of the plaintiff, evidence was received, though objected to, that, on other occasions and at different times and places, the screens were open and cinders escaped. The presiding judge ruled that this evidence was admissible. Held, that such evidence was inadmissible to support the plaintiff's case, when it was tendered and received.

All the English and American cases bearing on the question were examined and discussed by HARRISON, Ch. J., who, after stating the facts, says: "The declaration charges negligence by the defendants on a particular occasion and at a particular place, whereby, etc., and this the defendants deny. The only issue therefore, for the determination of the jury, was whether there was the negligence charged, on the occasion and at the place alleged, resulting in damage to some amount to the plaintiff. If, on the day and at the place in question, the screens were open and sparks escaped, one or more of which sparks set fire to the pile of lumber, there was such negligence and such damage as alleged, and the jury should find for the plaintiff. It could not assist the jury in coming to a determination on that issue to show that, on other days and at other places, the screens were open and sparks escaped. Such evidence would, in my opinion, be more likely to mislead than to assist the jury in arriving at a proper determination." So in this case, what was done or omitted to be done, at other times, is immaterial.

As the case is one of grave importance, it may not be inexpedient to consider the various legal questions, which may arise in its different aspects in the trial of the case hereafter.

II. The defendants are only responsible for neglect of duty. They are bound to use ordinary and common care and diligence to keep the premises and the usual passageway to them safe for the access of all persons coming to them at seasonable hours by their invitation, express or implied, or for any purpose beneficial to them, they exercising ordinary care in so coming. If the premises are in any respect dangerous, they are bound to give such visitors notice, to enable them with ordinary care to avoid the danger. *Knight v. P. and S. and P. Railroad Co.*, 56 Me. 235; *Campbell v. Portland Sugar Co.*, 62

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id. 552; *S. C.*, 16 Am. Rep. 503; *Elliot v. Pray*, 10 Allen, 378; *Seeny v. Old Colony and Newport Railroad Co.*, 10 id. 369; *Chapman v. Rothwell*, 96 E. C. L. 168; *John v. Bacon*, L. R., 5 C. P. 437. Such are the general principles of law applicable to the case.

The counting room of the defendants was on the lower floor. This was the defendants' place of business. The editorial and composition rooms were in the second story. If there was an implied invitation, or permission merely, as a matter of accommodation, as the defendants' witnesses testified, the question would arise, if an invitation, whether such invitation could be implied after business hours and through the night, when the inhospitable absence of light would seem to negative such invitation.

III. But it is well settled, if the plaintiff was at the place where the injury was received by license merely, that the defendants would owe him no duty, and that he cannot recover. In *Holmes v. N. E. R. W. Co.*, L. R. 4 Ex. 257, BRAMWELL, B., said: "If the plaintiff had gone where he did by mere license of the defendants, he would have gone there subject to all the risks attending his going." In the same case CHANNEL, B., remarked: "I quite concur in the rule laid down by the cases that where a person is a mere licensee he has no cause of action on account of dangers existing in the place he is permitted to enter." In *Blackman v. Toronto Street Railway Co.*, 38 Up. Can. Q. B. 173, the deceased, a boy selling newspapers, got on a street railway car at the rear end and passed through the car to the front platform where the driver was standing; he stepped to one side behind the driver and fell off, there being no step on that side, and was killed by the car running over him. The boy had paid no fare. It appeared that newsboys were allowed to enter the cars to sell newspapers without being charged. It was held that no right of action existed against the defendant; that there was no breach of duty to him, and that he must take the cars as he found them. "Assuming," says BURTON, J., "for the purposes of this case, that the defendant would be bound by any license or permission given to the deceased by the driver, he was, at best, in the position of a licensee, and, although whilst there the defendants would not be justified in injuring him by careless driving, any more than they would be by reckless driving over him if on the street, it is clear there was no duty on the part of the defendants, as regards the deceased, to have the steps of the cars in any other condition from that in which he found them when he availed himself of the permission to enter

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He acquired no right, and whatever may have been the obligation of the defendants as regards their passengers, they owed no duty to the deceased to keep the car in repair." In the same case Moss, J., remarks: "The passengers may have the right to insist that the car shall be free from patent defects, as the court of Queen's Bench holds, but the licensee must take the vehicle as it is. He cannot claim that it should have been safer or stronger." "If," remarks HAGARTY, Ch. J., "in the hall or office of a large hotel, newsboys or others were seen coming in and going out offering newspapers, etc., for sale, I do not think there would be any implication in the event of an accident that such persons were guests in the hotel, or were there under any contract, express or implied, with the host or owner that the premises should be in any particular order or condition."

The distinction between what is due to one on the premises by invitation, and a mere licensee were fully considered and discussed in an elaborate opinion of Lord Chief Baron LEBROY in the case of *Sullivan, Exr. v. Waters*, 14 Ir. Com. L. 466. The case came before the court on demurrer to a summons and plaint brought by the widow and administratrix of Patrick Sullivan, claiming damages from the defendants under Lord CAMPBELL's act, on the ground that the death of Patrick Sullivan was occasioned by the negligence of the defendant. The negligence relied on is stated to consist in the permitting an aperture in the loft of the defendant to remain unguarded and neglected, by reason of which the deceased, passing along the floor of the loft, fell through the aperture and received injuries of which he died. The statements in the declaration, observes the Chief Baron, are, in substance, "that the defendant, at the time of the grievances in question, was in the possession of a distillery, and loft connected with it; that Patrick Sullivan was employed by him as a laborer to do certain work about the distillery at night; that Patrick Sullivan, as such laborer, had, whilst so employed, access by the license of the defendant to one of said lofts at night, and by such license used one of said lofts for the purpose of sleeping, during the intervals of the night when he was not actually engaged in said employment. The summons and plaint then proceeds (in the form of an assignment of a breach) to assert: Yet the defendant, well knowing the premises, wrongfully and negligently permitted a certain aperture, then being in the floor of said loft, to remain open, without being properly guarded and lighted, by reason whereof the said Patrick Sullivan, whilst passing along the floor of said loft in

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pursuance of said license, fell through the said aperture, and was thereby wounded and injured; and by reason of the wounds and injuries thereby occasioned to him as aforesaid, the said Patrick Sullivan, afterwards and within twelve months before this suit, died. The pleading states that the defendant had access to the loft, for the purpose of sleeping, by the license of the defendant; which negatives that he used the loft for that purpose under the contract of his employment. It is therefore quite plain, that if any obligation towards the deceased existed in the defendant to guard or light the aperture, such obligation must have arisen from the license to use the loft at night, and from the fact that the deceased used the loft in pursuance to such license." After an elaborate and exhaustive review of all the authorities the Chief Baron concludes thus: "The deceased took the permission to sleep at the loft, instead of remaining up at night or sleeping elsewhere, during the intervals when he was not engaged in the business of the defendant. He must, I think, be considered as having taken the permission (to apply the language of WILLIAMS, J., in *Hounsell v. Smyth*, 7 C. B., N. S. 731), 'with its concomitant conditions, and it may be, perils.' Under such circumstances he became his own insurer."

IV. Whatever may be the position of the plaintiff, whether there by express or implied invitation or as a mere licensee (his presence being simply permissible), he was bound to exercise common care and caution. He wished to find the Press office. He had never been there and did not know where it was. He was ignorant after he got to the head of the stairs as to the location of the door leading from the passageway into the editorial rooms of the defendants. It was dark and he was a stranger to the premises. The alternative in such a case, as presented by BRAMWELL, B., in ordering a nonsuit was that "if it was so dark that the plaintiff could not see he ought not to have proceeded without a light. If it was sufficiently light for him to see he might have avoided the staircase, which is a different thing from a hole or trap-door through which a person may fall." *Wilkinson v. Fairrie*, 1 H. & C. 633. "In general," remarks POLLOCK, Ch. B., in that case, "it is the duty of every person to take care of his own safety and not to walk along a dark passage without a light to disclose to him any danger." In *Forsyth v. Boston and Albany R. R. Co.*, 103 Mass. 513, it appeared that the plaintiff was a passenger in the defendants' cars at night, at a station of the defendants, on one of two platforms extending along each side

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of the track to a highway (which, as the plaintiff knew, crossed the railroad), and having a step at the end next the highway; that instead of walking along the platform he voluntarily stepped from it with the intention of going obliquely across the track to the highway, and when he stepped off fell into a cattle-guard dug across the track and was injured; that the night was so dark that he felt with his foot to find the edge of the platform, and that he did nothing to ascertain what would be found on stepping from the platform. Held, that he was not in the exercise of due care and could not recover because he did not take any precaution to ascertain if he could make a step with safety. In *Pierce v. Whitcomb*, 48 Vt. 127; S. C., 21 Am. Rep. 120, the facts were these: The plaintiff and the defendant were farmers. The plaintiff went to the defendant's late in the evening to buy some oats. The defendant kept his granary locked. He obtained the key and went with the plaintiff to the upper floor of the granary where the oats were, and while the defendant went for a measure, the plaintiff walked about the floor in the dark, fell through an aperture therein, and was injured. Held, that the defendant was not liable for the injury. If the plaintiff's want of common care and prudence was the cause of his injury he has only himself to blame and cannot recover.

Exceptions sustained.

WALTON, DANFORTH, PETERS and LIBBEY, JJ., concurred. VIRGIN, J., concurred in the result.

BOYD V. CARLTON.

(69 Me. 200.)

Dower — assignment of — improvements by grantees of husband.

In an action for dower in part of a tract of land conveyed by the husband, improvements made by the husband's grantees on the demanded premises are not to be embraced in the estimate of value; but if the husband's immediate grantee has conveyed in severalty, the increased value by reason of improvements made by such grantees is to be reckoned.

ACTION of dower. The opinion states the case.

N. Webb and T. H. Haskell, for the plaintiff.

J. & E. M. Rand, for the defendant.

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BARROWS, J. The lot in which the plaintiff here demands her dower is part of a parcel of about four acres of land in Portland, which was owned by the plaintiff's husband during the coverture, until it passed from him in 1841, by the levy of an execution on the entire parcel in favor of the president, directors and company of the Exchange Bank. At the time of the levy there were no buildings on said four acre parcel; but a few years later, a street was opened through it, and the remainder was divided into lots of convenient size, one of which is the defendant's, and all of which have passed into the hands of sundry persons, holding under sundry mesne conveyances from said bank; and valuable houses have been built upon all of them. The defendant's lot has been improved by filling, draining and fencing, and the erection of a valuable house thereon.

The defendant not denying the plaintiffs right to dower in this lot, contends that she is entitled to have set out to her only such part thereof as will produce an income equal to one-third of the income which said lot would now produce if no improvements had been made since the levy upon any portion of the tract levied upon.

The plaintiff claims that she is entitled to her dower in the premises described in her writ according to the present value thereof, excluding the increased value by reason of improvements on the same by the successive tenants since the time when her husband aliened the premises, but that she, and not the tenant, is entitled to the benefit of any increased value of the lot by reason of improvements made since the levy on other parcels of the entire four acre tract.

Both parties accept as correct the general principle as stated in many American cases where dower is awarded against the alienees of the husband or their grantees, and in the text books, substantially thus: The dower is to be assigned according to the value of the lands at the time of the assignment, excluding the increase in value by reason of improvements made on the premises by the alienees, and giving the dowress the benefit of any increase from other circumstances; or as expressed by this court, by **SHEPLEY, J.**, in *Carter v. Parker*, 28 Me. 509: "The widow is entitled to have such part of the land set out to her as dower as will produce an income equal to one-third part of the income which the whole estate would now produce if no improvements had been made upon it since it was conveyed by the husband."

"She is not entitled to be endowed of improvements made by the

grantee of the husband, or by the assignee of such grantee. The widow is to be excluded from the improved value arising from the labor and money expended upon the land since the alienation, but not from that which has arisen from other causes." *Mosher v. Mosher*, 15 Me. 371.

"The plaintiff is entitled to her dower, excluding in the assignment of it any improvements made by the grantee or his assignee since the alienation." *Hobbs v. Harvey*, 16 Me. 80.

The contention that arises between the parties is whether expressions like those above quoted from our own decisions apply only to the lot in which dower is demanded in the suit, and is to be set out; or whether, where, as here, the lot is part of a larger parcel aliened by the husband by one conveyance, they exclude all increased value by reason of improvements by other grantees of the alienee on other parts of the parcel.

Such a contention could not arise under the English rule as laid down by Lord DENMAN in *Riddell v. Gwinnell*, 1 Q. B. 682; S. C., 41 E. C. L. R. 728, where he discusses at large the ancient authorities, Fitz Herbert, and Plowden, and Coke, and concludes, that considering the nature of dower and the remedy provided for it by the law of England, the right unquestionably attaches on all of the lands of which the husband was seized during the coverture, "at the period of his death according to its then actual value without regard to the hands which brought it into the condition in which it is found; the law apparently presuming that it will continue substantially the same up to the assignment." He adds, "Mr. Park (on Dower, 257) informs us that 'the understanding of the profession is that the wife shall be endowed of the land as she finds it at the time of her title to dower consummated.' We have permission from Sir EDWARD SUGDEN to state that he always considered the rule to be that the widow is entitled to have assigned to her as her dower so much in value as is equal to a third in value according to the condition of the estate at the time of her husband's death." In fine, under Lord DENMAN's rule, he who builds on land in which there is an outstanding inchoate right of dower finds himself, after the death of the husband when the dowress comes, in the position of any other man who builds on land to which another has a paramount title.

But in this country, where land is more widely distributed in small parcels, and changes owners more frequently, the possession of it being less valued and the title less scrutinized than in England, it

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was long ago felt that such a rule would often produce inequitable, and in some cases, disastrous results; and the common law as held by the courts changed to accommodate itself to the new circumstances. The modification seems to have been adopted for the reasons referred to by PARSONS, Ch. J., in *Gore v. Brazier*, 3 Mass. 544, prominent among which is the idea that public policy requires it so that purchasers may not be discouraged from improving their lands.

Widows whose husbands had aliened with warranty during the coverture, and whose interest in the personals that might be required to respond for a breach of the warranty was large, would be likely also to adjust their claims, if they made any, upon easy terms, so that neither their children's nor their own share of the personals would be burdened thereby.

However it has come about, the difference between the American rule and that of Lord DENMAN is well established. The husband, while he has theoretically no control over his wife's right to dower, has it in his power to affect its value by his conveyances, *i. e.*, he may compel her to claim and receive it in many small parcels, the owner of each of which may set out her dower therein, excluding the value of all improvements made thereon by himself or his grantors since the alienation by the husband.

The natural tendency of such alienations under the American rule is to diminish the value of the dower, because there is less probability that the dowress will be able to put many small parcels to the profitable use which she might make of one large one. The question presented in this case, then, is one which is almost sure to arise whenever the husband has aliened, without warranty, a considerable tract that has been subsequently divided and improved, and it needs careful consideration.

The counsel for the defendant ingeniously argues that the subdivision since the alienation should not affect the general principle, because the dowress will in that way in her various suits indirectly get the benefit of all the improvements made on the four acres, which clearly she could not do if it had remained the property of the original purchaser, and had been improved by him or by many purchasers as tenants in common; and he claims that while the subdivision affects the mode of proceeding to obtain the dower and of setting it out, these are only matters of form, not of substance, and the dowress should be excluded from the benefit of all improvements made on the premises aliened by the husband, as well as those made by

the defendant or his grantors, on the premises in which dower is demanded in this writ.

If we were satisfied that the subdivision affected the setting out of the dower in the form only and not in substance, it would go far to show that the governing principle ought not to be changed because of the subdivision after the alienation. But we think this proposition of the defendant cannot be maintained.

As before suggested, dower in a single parcel of four acres, set out as it ought to be in one piece, is obviously capable of being used in various ways more profitably than detached pieces of insignificant dimensions, such as the dowress might be obliged to accept when the subdivision has taken place. These last might depend for their value mainly upon the inconvenience to which the occupant of the small lot is subjected by the possession of the dowress, and his ability and willingness to free himself from that inconvenience by payment of a reasonable sum to procure the extinguishment or release of her right. We think there is a substantial difference between the dower in a single four-acre piece and dower in the same when it has been divided into a score of small lots. Moreover, the case finds that after the parcel went into the hands of the husband's alienee a street was opened through the tract preparatory to the subdivision of the remainder. Whether this was by dedication and acceptance does not appear. Nor is it material, for however it was brought about, the effect was to defeat the claim for dower in so much of the four acres as was thus appropriated. 1 Wash. R. P. (1st ed.) book 1, chap. 7, § 37, p. 220, and cases there cited.

Now, if the husband had aliened in small lots, as the tract is now divided, to the several owners, of whom the defendant is one, it would not be contended that the owner of either lot could claim that any improvements, except those made by himself upon his own lot, should be excluded from the estimate. We think, for the reasons assigned at large in *Fosdick v. Gooding*, 1 Me. 30, that since the consequences to the widow in respect of dower must be the same where he aliens to one, and the grantee afterwards conveys in several parcels to several, the rule for the assignment should be the same in such case as it would be if the husband had made the division directly.

The acts of the husband which are powerless to defeat ought not to be suffered to impair the value of the wife's dower beyond their necessary results under the American rule. Creditors who take the

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husband's lands by levy take them subject to the contingency of the wife's claim of dower. Those who derive their title from the levying creditors take it with the same burden as though they derived it directly from the husband by a levy on the parcel which they own. The division by the levying creditors of the tract levied on as the husband's property, and the sale of it to various parties in small lots, and the improvements made by the owners of the other lots, must be regarded if they have tended to enhance the value of the defendant's lot, and consequently of the dower to be assigned therein, as among the "other causes" and "other circumstances," to the benefit of which the dowress is entitled.

The language quoted from the decisions applies only to the lot in which dower is demanded in the suit and not to other land of the husband, though alienated at the same time and by the same act.

The plaintiff is entitled to have her dower assigned in the lot held in severalty by this defendant precisely as though that lot had been aliened by the husband as a distinct estate and by a separate conveyance.

Judgment for demandant for her dower accordingly.

APPLETON, Ch. J., WALTON, VIRGIN and LIBBEY, JJ., concurred.

KELLOGG v. CURTIS.

(69 Me. 212.)

Negotiable instruments — evidence — burden of proof as to good faith.

Delivery of a promissory note is *prima facie* evidence of a *bona fide* holding, but if there is evidence of fraud in its inception the burden is on the indorsee to show that he took it without notice of the fraud. Mere suspicious circumstances will not amount to such notice.

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

G. W. Verrill, for the plaintiff.

J. H. Drummond and J. O. Winship, for the defendant cited *Kellogg v. Curtis*, 65 Me. 59; *Roberts v. Lane*, 64 id. 108; *S. C.*, 18 Am. Rep. 242; *Smith v. Harlow*, id. 510.

PETERS, J. The defendant is the maker and the plaintiff an indorsee of a promissory note. The maker defends the suit on the note upon the ground that it was obtained of him by the payee through fraud.

The judge ruled, at the trial, that the burden of proof was upon the plaintiff to show that he had the rights of a *bona fide* holder, the alleged fraud being first admitted by the plaintiff or proved by the defendant. This was correct. Had the defense been merely a want or failure of consideration in the note, the burden to prove a *bona fide* purchase would not have been cast upon the plaintiff. He would have been presumed to be a *bona fide* purchaser until proof was introduced to overcome such presumption. *Smith v. Prescott*, 17 Me. 277; *Noxon v. De Wolfe*, 10 Gray, 343, and cases; *Tucker v. Morrill*, 1 Alien, 528; 2 Greenl. Ev., § 172. But where fraud or illegality in the inception of the note is shown by the maker, that puts the burden on the indorsee to show himself to be an innocent holder. The reason for this distinction, as generally given, is that a presumption exists that a fraudulent payee would be likely to shield himself by placing the note in the hands of another person to sue upon it.

From the character and importance of such a defense, this would seem to be a reasonable requirement, and it is approved by quite all the modern authorities. *Baxter v. Ellis*, 57 Me. 178; *Perrin v. Noyes*, 39 id. 384; *Sistermans v. Field*, 9 Gray, 331; *Smith v. Livingston*, 111 Mass. 342; *Bailey v. Bidwell*, 13 M. & W. 73; *Smith v. Bruin*, 16 Q. B. 244; 1 Pars. on Notes and Bills, 184 *et seq.*, and notes.

The learned judge further ruled: "That in order to entitle the plaintiff to recover, he must show that he himself, or some prior holder whose rights he has, came by the note fairly, for value received, before maturity, without knowledge of the fraud, in the due course of business, unattended with any circumstances justly calculated to awaken suspicion." This was not correct, although it may have been the rule commonly accepted in this State up to the time when the ruling in the case at bar was given. Since that time, after a careful reconsideration of the question, it has been determined by this court, in the case of *Farrell v. Lovett*, 68 Me. 326; S. C., 28 Am. Rep. 59, that such a rule is unjust, impracticable, and upon principle and authority unsound. It is there decided that the indorsee in such a case can recover, if it appears that he took the note before

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maturity for value and without notice of any fraud or illegality. Suspicious circumstances attending the transaction of indorsement, especially if aided by auxiliary evidence, may have a tendency to show to the minds of the jury that the indorser knew of the fraud, or that he acted in bad faith. But such circumstances do not, as a matter of law, show such a thing. If an indorsee had reasonable cause to know that fraud had been perpetrated upon the maker by the payee of the note, a jury would generally be justified in finding that he did know it. But it would not necessarily follow. Reasonable cause to know a fact is one thing, and actual knowledge of it is another. What convinces one man may not convince another. The point to be found is not whether the indorsee might have ascertained and could have known that the note he purchases was fraudulently obtained, but whether he in fact knew it, or acted in bad faith. It is a question not of negligence or diligence, but one of honesty and good faith. *Carroll v. Hayward*, 124 Mass. 120. The inquiry naturally occurs, what must the indorsee show in order to sustain the burden cast upon him where the note originated in fraud? He makes out a *prima facie* case by proving that the note was indorsed to him for value before maturity. Nothing else appearing, a presumption arises that he purchased the note in good faith without notice of the fraud. This presumption exists, because it is not likely that he would give full value for a note which he knew or believed to be fraudulent, taking the hazard attending it upon himself; and because it would be difficult to prove his good faith in any better way than that he gave value for it.

To show, except by inference and presumption, that he did not have notice of the fraud, would be to establish a fact negative in its character. This presumption stands instead of direct proof till overcome by rebutting evidence. Where there is evidence on both sides affecting the several points or propositions necessary to be shown, then the general burden of proof is upon the plaintiff to make them out. In such case, too, the plaintiff has the aid of all the natural presumptions in his favor. *Hapgood v. Needham*, 59 Me. 442; *Sweet v. Hooper*, 62 id. 54; *Small v. Clewley*, id. 155; *Noxon v. De Wolfe*, 10 Gray, 348; *Smith v. Livingston*, 111 Mass. 342; *Hart v. Potter*, 4 Duer, 458.

The purchase by an indorsee, must be "in the usual course of business." These words are usually defined to mean "according to the usages and customs of commercial transactions." If the plain-

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tiff purchased the note before maturity for value, that would be such a transaction.

Exceptions sustained.

APPLETON, Ch. J., WALTON, DANFORTH, VIRGIN, and LIEBEY, JJ., concurred.

PEARSON v. CITY OF PORTLAND.

(69 Me. 273.)

Constitutional law — "equal protection of laws."

A statute providing that no person shall recover damages from a municipality for an injury from a defect in a highway, unless he resides in a country where similar injuries constitute a like cause of action, is unconstitutional.

ACTION by a resident of Cuba for personal injury by a defective way. The opinion states the point. The plaintiff had a verdict below.

S. C. Strout and *H. W. Gage*, for plaintiffs.

H. B. Cleaves, city solicitor, for defendants. The legislature can exercise all power not prohibited. *People v. Flagg*, 48 N. Y. 401. Charters granted cities may directly or by implication exclude the general laws of the State, and peculiar and exceptional regulations may be made applicable to particular portions only and still be valid. *Nathaniel Goddard, petitioner*, 16 Pick. 504; *Commonwealth v. Patch*, 97 Mass. 222; *City of St. Louis v. Weber*, 44 Mo. 547. The Constitution of the State in conferring the legislative power has established such prohibitions as the people see fit to impose. In ascertaining the powers of the legislature under the Constitution we look not to what the instrument authorizes to be done, but to what is prohibited. *McMillen v. Lee*, 6 Clark (Iowa), 391. It is only necessary that the law should be uniform, and its effect the same upon all persons standing in the same category. *Waterville v. Commissioners*, 59 Me. 80; *Smith v. Judge*, 17 Cal. 547. Whether an enactment is reasonable or for the benefit of the people it is for the legislature alone to decide. *Moore v. Veazie*, 32 Me. 343. This State law does not come within the class of those

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privileges and immunities guaranteed by amendment, article 14 United States Constitution. *Corfield v. Coryell*, 4 Wash. C. C. 380; *Abbott v. Bailey*, 6 Pick. 92; *Connor v. Elliot*, 18 How. 591; *Ward v. Maryland*, 12 Wall. 418; *Lemmon v. People*, 26 Barb. 270; 20 N. Y. 562; *Crandall v. State*, 10 Conn. 340; *Butler v. Farnsworth*, 4 Wash. C. C. 101; *State v. Medbury*, 3 R. L. 138; *People v. Imlay*, 20 Barb. 68; *Ducat v. Chicago*, 48 Ill. 172; *Cincinnati Health Association v. Rosenthal*, 55 id. 85; *Haney v. Marshall*, 9 Md. 194.

WALTON, J. In 1872 the legislature of this State enacted the following statute: "No person shall recover of any city or town in this State damage for injury to person or property, which damage is claimed to have been done in consequence of any defect, or want of repair, or sufficient railing, in any highway, townway, causeway or bridge, provided the said damage be done to or claimed by any person who was, at the time said damage was done, a resident of any country where damage done under similar circumstances is not recoverable by the laws of said country." Act 1872, ch. 34.

The only question we find it necessary to consider is whether this act is constitutional. We think it is not. It is in conflict with the fourteenth amendment of the United States Constitution, which declares, among other things, that no State shall "deny to any person within its jurisdiction the equal protection of the laws." By the general statutes in force in this State at the time of the passage of this act (and still in force), every person sustaining an injury, in person or property, through any defect, or want of repair, in any highway, townway, causeway or bridge, could recover for the same, in an action on the case of the town, city or county whose duty it was to keep the way in repair. R. S., ch. 18, § 65. This is a protective law. It guards the traveler against injuries, by making towns and cities more careful to keep their ways in repair, and shields him from loss in case he is injured through their negligence in not keeping them in repair. And it is universal in its application. It protects every one alike. The act of 1872 undertakes to destroy this equality of protection. It declares in effect that one class of persons shall not be thus protected; that if they happen to be residents of a country where no similar protection exists, they must travel in this State at their peril, and without that protection which the law affords to all others. They may be citizens of the United States and of this State, and within its jurisdiction at the time of injury; still, they are denied

redress, denied "the equal protection of the laws," on account of the condition of the law of a foreign country, for which they may be no more responsible than they are for the color of their eyes or the color of their skins. The denial might as well be based on race or color as upon the law of a foreign country; for the parties to be affected by it may be as powerless to change the one as the other. The general statute may undoubtedly be repealed; but the court is of opinion that while it remains in force for the protection of one class of persons within the jurisdiction of the State, it must remain in force for the protection of all others similarly situated.

The plaintiff was within the jurisdiction of the State at the time of her injury. She has established her right to recover for it, unless the act of 1872 is a bar. For the reasons above stated, the court is of opinion that it is not a bar.

Judgment on the verdict.

APPLETON, Ch. J., BARROWS, VIRGIN and LIBBEY, JJ., concurred

BLAISDELL V. HIGHT.

(60 Me. 306.)

Will — devise — subsequently acquired lands.

A devise of all the testator's real estate in S., and the residue of his "personal estate and possessions of whatever kind or name," does not cover land in another place, many years subsequently descending to the testator.

EJECTMENT. The lands in question were claimed by the plaintiff as heir of Alexander Barnard. The defendant claimed under his will. The opinion states the other facts.

S. S. Brown, for plaintiff.

E. F. Pillsbury, for defendant. The will indicated that the testator intended to make a full disposition of his property and ought to receive that construction. R. S., ch. 74, § 5; 2 Redf. Wills, 116; *Brimmer v. Sohier*, 1 Cush. 118; *Winchester v. Forster*, 3 id. 366; *Fisk v. Keene*, 35 Me. 349; *Deering v. Adams*, 37 id. 264; *Cotton v. Smithwick*, 66 id. 360. The words "situate in Sidney" are merely words of description and not limitation. The concluding words

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"and possessions of whatever name or kind" show an intention to dispose of everything not previously devised, and this general form of expression is sufficient to convey the estate. *Hopewell v. Ackland*, 1 Salk. 239; *Wilce v. Wilce*, 7 Bing. 664, and cases there and before cited.

PETERS, J. The testator after bequeathing a support to his wife and sums of money to several children added in his will these words: "I give and devise to my son, Albert G. Barnard, his heirs and assigns, all my real estate situate in Sidney aforesaid; also all the residue of my personal estate and possessions of whatever kind or name." Many years after the will was made an undivided fourth of a parcel of land not situate in Sydney descended to him from a brother. It is reasonable to suppose, as argued on both sides, that at the date of the will he had no expectation of such an inheritance. Nor does it appear that at that time he had any real estate outside of Sidney. The question is, does the will operate to devise this real estate not situate in Sidney? The claim that it does rests upon the idea that the words "situate in Sidney" undertake to describe rather than to limit the real estate to be devised, the testator meaning to devise all the real estate he had or might have, wherever situated, and that the word "possessions" was used to embrace real as well as personal estate. The argument is aided by the suggestions, usually of force, that the presumption is, that the testator intended to leave no possible property undisposed of, and that the policy of the law favors the rule of preferring a construction which will prevent intestacy.

Although the question is a nice one we are constrained to think, that all things considered, this interpretation is not the correct one. We are to ascertain the real intent of the testator. It will be noticed that the will was drawn by some one tolerably familiar with the use of legal terms. The word "possessions" may, no doubt, include real estate if so intended, though such would not be its technical signification. Bouvier so declares in his law dictionary. The words "all I may die possessed of" may include real estate (*Wilce v. Wilce*, 7 Bing. 664), or may not (*Monk v. Mawdsley*, 1 Sim. 286), just according to the context with which the words are associated.

The writer of the will had used the term "real estate" describing the property in Sidney and knew the force and meaning of it. The presumption is that if he had intended to include other real estate in

an after-description he would have used the same term again. If he intended to leave all his real estate to his son, why should he have devised it in two parcels instead of including it in a single description? If it was his intention to devise all lands then or ever to be possessed, he would have left off the qualifying words "situate in Sidney." And if by the word "possessions" he intended to include realty, there was no necessity of the other clause in addition to it. It has been held that, where the word "land" has been used in a preceding portion of a will and omitted in a later portion of the instrument, the omission of so important a word could not have been accidental. Redfield in his work on Wills, cites cases to that effect.

Had the testator intended to include real estate in the word "possessions," it strikes us forcibly that he would not have used the prefix "personal" at all, and the language would have been "all the residue of my estate and possessions." The words "of whatever kind or name" are not naturally descriptive of real estate, but usually apply to personal property. Lands are not of various kinds and names often. The word "personal" was manifestly used to qualify and describe both estate and possessions. Accomplished draughtsmen often use words somewhat tautologically in the effort to embrace every description of personal estate.

The defendant's counsel insists that a general intention existed in the mind of the testator to dispose of all the property he ever expected to have. The trouble is that he had not employed words sufficient to carry that intention into effect. There may have been an omission. But the court are to construe and not make the will. After all, it is but conjecture that the testator would have made the favored son the devisee of still other real estate had he known he was to possess other. It might have led him to make an entirely different partition of his property among his children. In Roper's Leg. 1464, it is laid down that where a testator, in the disposition of his property, overlooks a particular event, which had it occurred to him he would have provided against, the court will not rectify the omission by implying or inserting the necessary clause. Then it is a general rule, that if it is uncertain and doubtful whether the testator intended to devise real estate, the title of the heir must prevail. At common law, after-acquired interests in real estate would not pass by will. By our statute (R. S., ch. 74, § 5) they do, provided such appears to have been the intention. *Bullard v. Goffe*,

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20 Pick. 252, 258; *Gibbons v. Langdon*, 6 Sim. 260; *Goodchild v. Fenton*, 8 Yo. & Jer. 481; *Cooper v. Pitcher*, 4 Hare, 485.

Judgment for demandant.

APPLETON Ch. J., DANFORTH, VIRGIN and LIBBEY, JJ., concurred.

RANDALL V. MARBLE.

(69 Me. 310.)

Deed — condition subsequent — restraint of marriage.

A grant to a grantor's daughter if she remained single, otherwise to his children, is void, a conveyance in restraint of marriage being illegal unless there is a valid limitation over, and this limitation being void because inferior to a title by descent.

EJECTMENT. The opinion states the case.

S. S. Brown and *E. O. Howard*, for plaintiff, contended: That the condition in the deed was a conditional limitation, rather than a condition subsequent, and therefore not void. 1 Story's Eq. 284, § 291; 1 Wash. R. Prop. 458-489, § 28; 2 Blackst. Com. 155, 156; *Parsons v. Winslow*, 6 Mass. 178; 4 Am. Dec. 107. But if a condition subsequent, then the condition may be good. The deed in no event is to be entirely void because grantee takes, at any event, certain rights, though not the land. 2 Redf. Wills, 292, § 22; *Creagh v. Wilson*, 2 Vern. 572; *Sillet v. Wray*, 1 P. Wms. 284. In regard to the exact rule as to conditions in restraint of marriage, the apparent tendency of the decided cases seems to be this: Where the condition is reasonable, or amounts to a limitation, and there is a grant over, it is valid; but where it is unreasonable, and there is no grant over, it is regarded as *in terrorem* merely, and void. 1 Story's Eq. 283, § 291 *b*-291 *d*; *id.* § 291 *e*; 2 Redf. Wills, 238.

E. W. and *F. E. McFadden*, for defendant.

PETERS, J. If a condition in restraint of marriage is annexed to a devise or conveyance of real estate, and the condition is subsequent and of a general character, it is held by the law to be void. (Whether this doctrine applies to the widow of a testator or not is held differently by different courts.) If the condition be partial,

and not general, as where it relates to the time when or the place where or the person with whom a marriage may take place, then it may or may not be void according as the condition imposed may be considered reasonable or otherwise.. In this case the grantor conveyed a parcel of land to his daughter Hannah, with a proviso that the gift was to stand if she remained single, otherwise the land to be divided among his three children, Hannah to have fifty dollars more than either of the others. Here the fee must have vested in Hannah, because it might have been in her and her heirs forever; the condition was subsequent and general; and the condition was void.

The counsel for the plaintiff, admitting the general principle to be as stated, seeks to avoid its application to this deed upon several grounds.

It is argued that the condition here is special and limited and not general, because the forfeiture was not to be of the whole estate conveyed. Hannah was in the event of marriage to have a portion of it. This does not bring the case within any recognized exceptions to the rule. There was to be an absolute forfeiture of an interest, if she married. It would be impracticable for the law to make distinctions as to amounts or values. The condition is nugatory whether it requires one sum or another to be forfeited. It is the character of the condition that makes it void or valid, and not the amount depending upon it. The less the amount to be forfeited, the less the importance of the condition requiring forfeiture. There are many cases among the reported decisions where the condition has been of an alternative character, the legatee to have one sum marrying and another sum not marrying, in which the distinction now called for has not been noticed. Such an exception would easily abrogate the rule itself.

The counsel for the plaintiff further contends that this is a conditional deed with a limitation over, and that therefore the condition is valid. Most courts (not all) admit the doctrine that a condition in restraint of marriage will be upheld when there is a valid gift or limitation over. The court of Massachusetts, as long ago as in 1810, doubted whether this would be regarded as a reasonable doctrine if it had then been presented as an original question. *Parsons v.*

Winslow, 6 Mass. 169, 181. And Chancellor KENT says the distinction has been supposed to be more refined and subtle than solid. 4 Kent Com. 127. Judge STORY gives as a reason why the condition is treated as ineffectual in case of not giving the estate over, that the testator is deemed to use the condition *in terrorem* only or

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he would make some other disposition of the bequest provided the condition is not kept. Other reasons are also assigned by other writers. One reason is that courts cannot relieve against the forfeiture in such case without doing an injury to the person to whom the estate is limited over. *Bac. Abr., Conditional Legacies*. Where the gift is until marriage and no longer and then over, there is nothing to carry the gift beyond marriage. *Morley v. Rennoldson*, 2 Hare, 570.

But we are of opinion that the provision in the deed in this case for giving over the estate is null and void. A limitation over to one's heirs, is of no effect, for the reason that the estate would descend to the heirs in case of forfeiture whether there was a limitation or not. A forfeiture to the grantor's heirs is therefore no forfeiture. To be valid it must be to a stranger. The presumption is that his heirs have been reasonably provided for by the testator or grantor without a forfeiture for their benefit. The title by descent is, in estimation of law, the worthier title. This is an old principle of the law, and clearly stated in the cases following: *Parsons v. Winslow*, 6 Mass. 169; 4 Am. Dec. 107; *Whitney v. Whitney*, 14 Mass. 88, 90. See authorities cited in the above cases. *Otis v. Prince*, 10 Gray, 581; *Searns v. Godfrey*, 18 Me. 158; *Roper on Leg.*, original page 763 *et seq.*, and cases cited.

The plaintiff further contends that this is not a limitation to the grantor's heirs, but in effect, a gift over to strangers, because the provision is that the property is to go to the heirs in unequal shares, Hannah having the most, and not as the law would apportion it. There may be several answers to this suggestion. The greater proportion is to the grantee herself. The testamentary provision of allowing Hannah the extra fifty dollars is not such as can be made effectual by deed. But even if a charge upon the estate in equity, the division among the heirs to be subject to it, the rule before stated applies just as strongly. Again, the remainder is not given to the children and their heirs, but creates a life estate in them only.

Taking into consideration all the objections that may be urged against it, we have no doubt that the crude and ill defined limitation attempted by the grantor in the deed is of no legal effect and utterly void.

Plaintiff nonsuit.

APPLETON, Ch. J., DANFORTH, VIRGIN, and LIBBEY, JJ., concurred

CUMBERLAND v. PENNELL.

(69 Me. 357.)

Office and officer — liability of county treasurer for moneys lost by robbery.

A county treasurer and his sureties are not liable for public moneys of which the principal was violently robbed without his fault.*

DEBT on a county treasurer's official bond. The opinion states the facts. Verdict for plaintiffs.

Bion Bradbury and C. F. Libby, for plaintiffs. By giving a bond in a penal sum for the performance of all the duties of his office, without exception, the depositary makes himself, by express contract, an insurer of the public funds in his hands. *U. S. v. Prescott*, 3 How. 578; *U. S. v. Morgan*, 11 id. 154; *U. S. v. Dashiel*, 4 Wall. 185; *U. S. v. Keebler*, 9 id. 83; *Boyden v. U. S.*, 13 id. 17; *Bevans v. U. S.*, 13 id. 56; *Halliburton v. U. S.*, 13 id. 63; *Muzzy v. Shattuck*, 1 Den. 233; *State v. Harper*, 6 Ohio St. 607; *Commonwealth v. Comly*, 3 Barr (Penn.), 372; *Union v. Smith*, 39 Iowa, 9; *Hancock v. Hazzard*, 12 Cush. 112; Whart. on Neg., § 290.

A. A. Strout, G. F. Holmes (Frye, Cotton & White with them), for defendants.

VIRGIN. J. Debt on the official bond of Thomas Pennell, as treasurer of the county of Cumberland, executed by him as principal with the other defendants as his sureties, and conditioned that he "shall well and faithfully attend to the duties of said office and perform all things required by said office to be performed from the 1st day of January, 1874, to the 1st day of January, 1875, the term to which he has been elected."

Under the brief statement pleaded the defendants offered to prove, in substance, that on December 30, 1874, while Pennell was sitting in the treasurer's office, with the door of the safe therein closed and bolted but not locked, he was suddenly and violently beset, overpowered and rendered senseless by robbers, who thereupon against his

* Compare *State ex rel. Township v. Powell* (67 Mo. 935), 29 Am. Rep. 512.

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will and without his fault, burglariously opened the safe and feloniously took and carried away therefrom the sum of money belonging to the county not paid over by him at the close of his official term, and for the recovery of which this action was brought.

The presiding justice ruled, that assuming the robbery proved as offered, it would constitute no defense. The main question for decision involves the correctness of that ruling.

As the money was taken from the safe in the treasurer's office no question relating to the ownership of bank deposits arises.

Counties are *quasi* corporations possessing but few powers and requiring a small number of officers. The general financial agents of a county are its county commissioners whose powers and duties are prescribed by the statute. They have the care of its property and the management of its business; cause its taxes to be assessed; obtain loans for its use; order its money to be paid in defraying its expenses, and examine, allow and settle accounts of the receipts and expenditure of its moneys. R. S., ch. 78, § 10. They act under oath but give no bond.

The moneys of the county are kept and handled only by the treasurer. He is required to be sworn and give a bond "for the faithful discharge of his duties in such sum as the commissioners order, and with such sureties as they approve." R. S., ch. 8, § 4.

Moreover, the statute also requires that every county treasurer "holding any money or effects belonging to his county shall annually, and oftener if required, exhibit an account thereof to the county commissioners for adjustment." R. S., ch. 8, § 16. In fact all the language of the statute relating to the subject-matter is predicated upon the idea that the moneys which come into the official custody of the county treasurer are not his own private funds but the county's, and that they remain so until legally paid out. R. S., ch. 78, § 10; *Mechanics' Bank v. Hallowell*, 52 Me. 545. If Pennell instead of being robbed had been sued and the money attached the attaching creditor would hardly expect to hold it, or if he had suddenly died, his successor in office would not have delivered over the money in the safe to Pennell's personal representative. *Thompson v. White*, 45 Me. 445.

Experience had taught the people of this State that public treasurers with comparatively small salaries are sometimes tempted to try to increase the emoluments of their trust by using the money coming into their possession, *virtute officii*, for purposes of specula-

tion not always financially successful, or by loaning it to friends who cannot always meet the notes given therefor. Consequently a statute (Stat. 1860, ch. 161, embodied in R. S., ch. 120, § 7) directed against such abuses, and entitled "An act to prevent the embezzlement of public money," was enacted, making such acts larceny and punishable accordingly. If, however, the "money in the possession of the treasurer or under his control by virtue of his office" be his own and not the county's, then we have the anomaly of a person being liable to be indicted and punished for larceny for using or loaning his own money.

In some of the States, however, by force of their statutes, treasurers and collectors become responsible as debtors for the money which comes into their possession by virtue of their office. *Colerain v. Bell*, 9 Met. 499, a case against a collector; *Hancock v. Hazzard*, 12 Cush. 112, against a town treasurer; *Muzzey v. Shattuck*, 1 Den. 233, against a collector. This last case was approved in *Looney v. Hughes*, 26 N. Y. 514, and in *Perley v. Muskegon*, 32 Mich. 132; *S. C.* 20 Am. Rep. 637, case against a county treasurer. We have no such statute as this relating to county treasurers, and as before remarked, the money which comes to their official custody is public and not private property.

The office of county treasurer is a public office; and we have sought in vain to find something in the common law which distinguished a public treasurer or depositary from other custodians of property, public or private. In some jurisdictions his duties, and his responsibilities even, have been increased and multiplied by various provisions of statutes, but in the absence of such statutory provisions his duties and obligations remain where the common law of bailment leaves them.

In this State the official duties of the county treasurer are prescribed in part by the common law and in part by the statute; the provisions of the latter more particularly defining his special duties, leaving his general duties unmodified. When the treasurer elect accepts his office he thereby takes upon himself all the duties thereof, general as well as special. His general duties, arising from the very nature of his office, are to receive the money of the county lawfully deposited with him, keep it safely, and pay it out according to law. *State v. Harper*, 6 Ohio St. 607. From these general duties accepted springs a legal obligation that he will bring to their performance good faith and reasonable skill and diligence, to enforce which the

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statute already referred to requires him to take upon himself the moral obligation of an oath that he will faithfully perform the duties which he has assumed, and give a bond, with sureties, with a condition of like import. R. S., ch. 8, § 4.

As already intimated the responsibility of the county treasurer, in the absence of any statute enlarging it, is measured by the common-law rule applicable to bailees for hire other than common carriers and innholders. He is bound, *virtute officii*, to exercise good faith and reasonable skill and diligence in the discharge of his trust, or in other words, to bring to its discharge that prudence, caution and attention which careful men usually exercise in the management of their own affairs, and he is not responsible for any loss occurring without any fault on his part. That this substantially is the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private — such as officers of courts having the custody of the property of suitors therein; trustees, except when they mix the trust property with their own, whereby the identity of the former is lost; marshals, appointed by courts of admiralty to take care of vessels and cargoes; receivers, etc., etc., is amply illustrated by the numerous authorities cited by BRADLEY, J., in *U. S. v. Thomas*, 15 Wall. 337, 343, 344; see, also, 1 Perry on Trusts, § 441, and notes.

Sheriffs, however, will not be excused for the escape of a person under arrest, although an armed multitude break the jail and rescue him; for the sheriff has the power of the county at his back to aid him in the execution of precepts, and “the law supposes the *posse* to be a sufficient defense against a rescue, and that no force is able to resist successfully the sheriff and his *posse*.” FORTESCUE, J., in *Crompton v. Ward*, 1 Str. 430. Whether a sheriff is held to the same strict accountability in relation to property attached or money collected is both declared and denied by high authorities. Story on Bailment, § 130; *Browning v. Hanford*, 5 Hill. 588; *S. C.* in error, 5 Den. 586, and cases cited in the chancellor’s opinion; *Moore v. Westervelt*, 21 N. Y. 103; *Phillips v. Lamar*, 27 Ga. 228. Some authorities make a distinction between property attached on mesne process and that seized on execution. *Bridges v. Perry*, 14 Vt. 262; *Briggs v. Taylor*, 28 Vt. 180. In the latter case REDFIELD, J., says: “The degree of diligence required of sheriffs is that of a bailee for hire, which is that which the manner and nature of his employment make it reasonable to expect of him as a prudent and careful man.”

The authorities are the other way in Missouri. *State v. Gatzweiler* 49 Mo. 26 ; S. C., 8 Am. Rep. 119.

Executors and administrators' responsibility is measured by that of trustees. "They are liable only for want of due care and watchfulness, and reasonable skill and prudence." 3 Redf. on Wills, 394.

The rigorous rule governing a common carrier — one whose general occupation is the carrying for hire — has for a long time been established, and it is said to have been founded in necessity. He is self-appointed. Being unknown to his employers, and not employed in special confidence, he must answer for all the risks which the salutary rule requires; otherwise, protection against combinations between such unknown persons, and others with whom they might collude, would be impracticable. But a county treasurer is not of this description. He is selected by the people in special confidence, to receive their money and disburse it as the statute directs. For an honest and prudent discharge of these plain and well-known duties his stipulation with the law binds him and his employers (constituents) pay him. His comparatively small salary shows that he is no insurer. And any losses that happen outside of this obligation, without any fault of his, the inhabitants of the county must bear.

Of course, the legislature may, at will, by general statute, change this rule of responsibility of public officers, as it can, within certain well-known constitutional limits, any other rule of common law. The office being created by the statute, it may be subjected to any reasonable conditions by the statute. A change of the rule, however, will not result necessarily from an addition of new duties. We look in vain through the ten additional sections of Revised Statutes, chap. 2, enacted in 1856, "for the better security of moneys in the State treasury," for any change in the degree of responsibility of the State treasurer. To effect this some provision is necessary, which clearly shows the intention of dealing with that subject-matter as distinguished from mere duty. It may be done in various ways. A positive provision to that effect will accomplish it. Thus, Revised Statute, chap. 63, § 15, after prescribing the conditions of the bond of a register of probate, provides: "And if he neglects to complete his records for more than six months at any one time, sickness or any extraordinary casualty excepted, such neglect shall be adjudged a forfeiture of his bond." So, by statute 1877, chap. 168, § 1, "any neglect by any county treasurer to make and forward the report provided in Revised Statute, chap. 136, § 13, shall be a

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breach of his official bond." So, in Indiana, after prescribing the duties of county treasurers, the statute of that State provides that, "if any county treasurer shall neglect or refuse to pay over all moneys as provided herein, he and his sureties shall be liable for the full amount which he should have paid over, together with interest, and ten per cent damages." 1 G. & H. 68, § 127. So, the United States statutes are very rigorous in relation to collectors, receivers and depositaries of public money, which may be found cited in the notes on page 346 in 15 Wall. See, also, the statute of New York, which imposes a definite liability on town collectors and their sureties, recited in *Muzzey v. Shattuck*, 1 Den. 233, 236-8. So, the statute of Ohio, in force when *State v. Harper*, 6 Ohio St. 607, was decided, provided (§ 24): "If any county treasurer shall fail to pay over all money with which he shall stand charged * * * suit may be instituted against him and his sureties; and it is made lawful for the court, at the first term thereafter, to render judgment against them for the amount due from such treasurer, with legal interest and a penalty of ten per cent thereon, from which judgment there shall be no appeal, or stay of execution; and the property of such delinquent treasurer and his sureties may be sold without appraisement."

The legislature of this State has never expressed such intense solicitude in relation to their public money in the hands of their treasurers.

Such, then, being the extent of the treasurer's responsibility at common law, and there being no statute increasing it, unless it arises from the bond which the statute requires him to give, we pass to an inquiry into the effect which his bond has upon his obligations.

As already seen the statute requires a bond stipulating "for the faithful discharge of his duties." This being the only condition, recourse must be had to the common and statute law for a specification of his duties. *Bevans v. United States*, 13 Wall. 61. The tender of a bond containing that condition, "in such sum as the commissioners order and with such sureties as they approve in writing," entitles the treasurer elect, after taking the statute oath, to enter upon the discharge of his official duties. He might enter into a common-law bond containing stipulations making him liable at all hazards. But one requiring of him more than a "faithful discharge of his duties" cannot be demanded of him as a condition precedent to his being allowed to hold the office. The same requirement is made of town treasurers, R. S., ch. 6, § 151; of collectors, ch. 6,

§ 100; of treasurers of savings institutions, ch. 47, § 89; or receivers of banks, ch. 47, § 61; and in fact of all official depositaries who receive and disburse the funds of their respective constituents.

In 1845, in *United States v. Prescott*, 3 How, 578, it was decided in substance, that while a receiver or other depositary of the public funds is a bailee, he is a special bailee; made such by his bond which constituted him an insurer; and that public policy required the party to be held absolutely. This case was followed, with more or less consistency, by numerous cases, in various jurisdictions, in which the question was directly or indirectly involved; among them the following: *U. S. v. Morgan*, 11 How. 161; *U. S. v. Dashiel*, 4 Wall. 182; *U. S. v. Keebler*, 9 id. 83; *Boyden v. U. S.*, 13 id. 17; *Bevans v. U. S.*, 13 id. 56; *U. S. v. Thomas*, 15 id. 337; *Commonwealth v. Comly*, 8 Penn. St. 372; *State v. Harper*, 6 Ohio St. 607; *New Providence v. McEachron*, 4 Vroom, 339; *Taylor v. Morton*, 37 Iowa, 550; *Union v. Smith*, 39 id. 9; *Halbert v. State*, 22 Ind. 125; *Morbec v. State*, 28 id. 86; *Roch v. Stinger*, 36 id. 346; *Steinbach v. State*, 38 id. 483; *Perley v. Muskegon*, 32 Mich. 132; *S. C.*, 20 Am. Rep. 637.

All this long array of cases follow, and so far as the point under examination is concerned, depend upon *U. S. v. Prescott*, *supra*; "prior to which," says MILLER, J., "I do not believe there was any principle of public policy recognized by the courts, or imposed by the law, which made a depositary of the public money liable for it, when it has been lost or destroyed without any fault, or negligence, or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safe-keeping." *U. S. v. Thomas*, 15 Wall. 354. To a similar purport, see opinion of COWEN, J., in *Browning v. Hanford*, 5 Hill, 591. And still the doctrine is strenuously urged for holding depositaries (as it is said) "strictly to the contract:" "for," say the court in *Commonwealth v. Comly*, *supra*, "if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would become incessant." Every one will concur in this statement literally construed as an abstract proposition; but when "shallow pretenses" are intended to include robbery without fault of the officer robbed, we are compelled to withhold our concurrence.

Notwithstanding the high character of the several courts whose decisions are above cited, we cannot yield our convictions as to the construction to be given to the bond in such case, or concur in rele-

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tion to the new-born public policy, based upon supposed facility or temptation, which depositaries of the public money are said to possess, for collusive robberies. "For," as was said by REDFIELD, J., in *Bridges v. Perry*, 14 Vt. 262, "we cannot believe that they are founded upon any just warrant, either of sound judgment or constant experience." Even that old doctrine which the law by necessity imposed in early times upon common carriers has practically become obsolete, since they are allowed to mitigate that original rigorous accountability by any stipulations which stop short of an excuse for their own negligence.

On the contrary, this is the first case in this State in which the "shallow pretense" of robbery, without fault on his part, has been interposed by a treasurer in an action upon his official bond; ever since the decision of *Potter v. Titcomb*, 7 Me. 302, the people of this State have entertained a different view from that promulgated for the first time in *U. S. v. Prescott*, as to the effect of an official bond stipulating for a "faithful discharge" of official duties. In the case last cited, MELLE, Ch. J., in discussing the nature of official bonds and the accountability of sureties thereon, said: "The design of all official bonds is to secure from losses those who are or may be interested in the faithful discharge of the duties mentioned in them. Such bonds are given to protect against damage occasioned by unfaithfulness, negligence or dishonesty in such officers. * * *

Sureties on such bonds are, in some respects, like underwriters upon the pecuniary responsibility and official fidelity of their principals."

So, in speaking of the official bond of the State Treasurer, APPLETON, Ch. J., in *Mechanics' Bank v. Hallowell*, *supra*, said: "The bond required is not so much for the moneys as for the faithful discharge of his duties in reference thereto. For the one it would be entirely inadequate, while for the other it might be amply sufficient."

So, MILLER, J., in the opinion already quoted from while speaking of *U. S. v. Prescott* and *U. S. v. Morgan*, said: "When the case of *U. S. v. Dashiell*, *supra*, came before the court I was not satisfied with the doctrine of the former cases. I do not believe now that on sound principle the bond should be construed to extend the obligation of the depositary beyond what the law imposes upon him, though it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver if no bond had been given, the object of taking the bond being to obtain sureties for the

performance of that obligation." He then adds what we have heretofore quoted.

Such a construction has been put upon the bond of bank tellers, *Union Bank v. Clossey*, 10 Johns. 271; *S. C.*, 11 id. 182; *American Bank v. Adams*, 12 Pick. 303, and that of cashiers, *Minor v. Mechanics' Bank*, 1 Pet. 46, 69; *Commercial Bank v. Ten Eyck*, 48 N. Y. 305.

The doctrine that the official bond of a public depositary rendered him an insurer of the public funds in his possession is no where recognized by Judge STORY. On the contrary he was of the opinion that robbery is a good defense. Colonel John L. Tuttle, a United States paymaster, was murdered, and robbed of the public funds in his official custody, and an action was brought therefor against Samuel Hoar, Jr., as administrator of Tuttle's estate. In the trial of the action at the May term, 1822, of the United States Circuit Court in Boston the defense of robbery was set up, and the jury, under the instructions of Judge STORY presiding, returned a verdict for the defendant, showing that the court must have ruled that robbery was a good defense. It seems the question was not carried any further and hence the case was not reported. In *U. S. v. Hoar*, tried the year before and reported in 2 Mason, 311, other questions were raised.

In New York, in an action on a county treasurer's bond conditioned that he would "faithfully execute the duties of said office, pay according to law all moneys which shall come into his hands as treasurer, and render a just and true account thereof," etc., the Supreme Court, comprising NELSON, Ch. J., and BRONSON and COWEN, JJ., held the treasurer's liability limited by the common-law rule, and that he was not responsible for money stolen from the treasurer's office without any fault on his part. *Albany v. Dorr*, 25 Wend. 440. This case was affirmed by the Court of Errors, though by an equally divided court, Chancellor WALWORTH voting for affirmance. 7 Hill, 584, note *a*.

Subsequently, in an action on a town collector's bond, the same court, consisting of BRONSON, Ch. J., and BEARDSLEY and JEWETT, JJ., held the collector liable under the same circumstances. After an elaborate analysis of the statutes pertaining to collectors, one provision of which is that the bond shall be a lien on the real estate of the collector and of his sureties till the condition be fully satisfied, the court said: "The statute imposes a definite liability on the collector and his sureties for the omission to collect and pay; and

whether that omission is the result of misfeasance or neglect, unavoidable accident or felony committed by another, we do not think it furnishes any defense to the action." *Muzzy v. Shattuck*, 1 Den.

233. The decision of this case is thus placed expressly upon the provisions of the statute relating to collectors. It was cited with approbation, so far as the reasoning is concerned, in *Looney v. Hughes*, 26 N. Y. 514, which was also an action on a collector's bond. SELDEN, J., speaking for the court, said: "The bond itself is a creature of the statute. Its form is prescribed by the statute. Independently of any statutory provisions on the subject, the obligors in such bond would only be liable to pay the damages which might accrue in consequence of any default upon the part of the collector. The conclusion is the necessary result of the provisions of the statute," citing *Muzzy v. Shattuck*.

Albany v. Dorr and *Muzzy v. Shattuck* are thus decided upon distinct and independent grounds, and are not inconsistent. The former is alluded to in the latter, but in nowise overruled, and has been cited with approbation as already stated *ubi supra*.

So in England, in an action by the trustees of a benefit building society, established and organized under the statutes 6 and 7 W. 4, ch. 32, and 10 G. 4, ch. 56, against the sureties of the treasurer, the court of Queen's Bench in 1852, held the same doctrine contended for. The treasurer covenanted, *inter alia*, that he would "faithfully discharge all the duties of treasurer;" obey the directions and instructions of the trustees in all particulars relating to his duties; and in particular, would faithfully and punctually account to them for all moneys, etc., which he in his office should receive. He was also required by the rules of the society to pay over in a given time the same moneys received. The defendants pleaded, *inter alia*, that, after the treasurer's receipt of the money sought to be recovered, and before the time when he ought to pay it over, he, without any fault on his part, was violently robbed of all said money; and that thereby he was unavoidably, without his fault, prevented from paying over the same. On the trial of an issue joined on these facts as alleged, the jury returned a verdict for the defendants.

On motion for judgment for the plaintiffs, *non obstante veredicto*, it was urged that a loss by robbery is not an "accounting" within the covenant; that money once received by the treasurer constituted a debt not dischargeable by the debtor's loss however unavoidable; that he is treated as a debtor by St. 10 G. 4, ch. 56, §§ 20, 22; that

if bailee, the treasurer's liability is not less than that of a carrier or innkeeper; and that the intention of the statutes is, at all events, to protect the funds of poor people intrusting them to these societies. But Lord CAMPBELL, Ch. J., and WIGHTMAN, ERLE and CROMPTON, JJ., who sat, overruled the motion, unanimously declaring that they entertained no doubts upon the points. *Walker v. British Guar. Ass.*, 18 Ad. & El. [N. S.] 277.

We consider the English case cited as directly in point and correctly decided. Were the law otherwise in this State, and known to be such, faithfulness and honesty, even if they continued to be considered commendable personal qualities, would be held, if not mere abstractions, matters of secondary importance at best in candidates. Such qualifications, accompanied by the highest capability, would, in the absence of sufficient property in the principal to secure his sureties, fail to obtain them; for many a responsible person would gladly sign a bond as surety, guaranteeing the faithfulness, honesty and capacity of his neighbor which were so potent in effecting his election to the responsible public station of county treasurer, who would long hesitate to insure the public against possible loss happening in spite of such qualities; for to insure against such a loss is not only vouching for the integrity of the officer, but practically for that of the rest of mankind — that they will not rob him.

After the promulgation of the contrary doctrine, it was deemed so unjust, harsh and oppressive that congress enacted a statute (14 U. S. St. 44) authorizing the court of claims to hear and determine the claims of a disbursing officer for relief; and in case the loss be found to be without fault or negligence on the part of such officer, to make a decree setting forth the amount thereof, which shall be allowed as a credit by the accounting officers of the treasury in the settlement of his accounts — thus practically overruling the decisions not allowing losses thus occurring to be set up in defense. We have no such court in this State. Our only courts of claims are the Supreme and the Superior Courts. And we do not perceive why such a loss cannot be set up in defense, if it be a proper subject for a claim to be allowed. Of course the burden is upon the defendant. If he can satisfy the jury that he was violently robbed, without any fault or negligence on his part, it is quite as well as to try the same issue in the form of a claim before some other tribunal.

The fact that the treasurer used the safe placed in the treasurer's office by the county commissioners, for the depositing of the money

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and other effects of the county therein, was no defense and rightly excluded. As already seen, the commissioners, like selectmen of a town, have limited powers. They have no control of the money of the county, though they "examine, allow and settle accounts of the receipts and disbursements of" it, and "have the care of its property and the management of its business." R. S., ch. 78, § 10. But the treasurer keeps and handles the money; and in doing this, he acts on his own responsibility and independently of the commissioners. They are creatures of the statute, but find therein no authority to direct how, where, or in what manner the funds shall be kept. If they could require him to keep the funds in a safe placed by them in the treasurer's office, they could also compel him to place them elsewhere; and thus absolve him from the necessity of exercising his own discretion, prudence and diligence, and relieve him from all responsibility in that behalf. On the contrary, it is optional with him to keep the funds wherever he deems it expedient; and by keeping them in the safe placed there for his convenience simply, he assumed the risk of so doing. The commissioners could not thus bind the county any more than the selectmen can their town. *Farmington v. Stanley*, 60 Me., 472. Nor could they release their treasurer from any liability arising from the use of the safe, if he thereby through negligence incurred any. See *Halbert v. State*, *supra*, precisely in point.

Our conclusion therefore is, that the treasurer's degree of responsibility was simply that which the common law imposed upon him as bailee for hire; that the statute of this State did not extend or enlarge it; that his official bond does not increase his responsibility, but simply affords security for the performance of his legal obligations; that if without fault or negligence on his part, the county treasurer is violently robbed of money belonging to the county, it is a valid defense, *pro tanto*, to an action upon his official bond; that the burden of proving such a defense is upon the defendants; that evidence that the treasurer used a safe placed in the treasurer's office for his use by the county commissioners, is immaterial; and that the commissioners have no authority to release a treasurer from responsibility.

If the people, who elect their own depositaries and place money in their hands, are willing to continue it there subject only to such obligation, and do not conclude to change it by legislative enactment, we do not conceive it to be our duty to make an imaginary; ub-

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lic policy, never until recently recognized by any court, the cause for creating a new obligation by judicial legislation.

Exceptions sustained. Action to stand for trial.

WALTON, DICKERSON, BARROWS and PETERS, JJ., concurred.
APPLETON, Ch. J., DANFORTH and LIBBEY, JJ., did not concur.

LEACH V. FRENCH.

(89 Me. 330.)

Bailment — hirer of horse becoming sick — liability of owner for expense of care.

One who hires a horse is not liable for the expense of caring for it if it becomes sick in his hands without his fault, but the owner is liable therefor to a third person, who, with his knowledge, cares for it at the request of the hirer.

ASSUMPSIT for board, care and burial of a horse.

H. A. Tripp, for plaintiff.

A. P. Wiswell, for defendant, contended: The testimony shows no liability from defendant to plaintiff. There was no contract between them, but there was one between the plaintiff and the hirer of the horse. Plaintiff never notified defendant that he was keeping the horse on his account.

BARROWS, J. The case, as stated in the report, is that the defendant owned the horse, for the board and keeping of which while sick, and the expense of its removal when dead, plaintiff brings this action, under the following circumstances:

Defendant let the horse to one Devereux. The horse became diseased and sick while thus let, and Devereux left him with the plaintiff for care and cure. While plaintiff was keeping the horse defendant wrote him informing him that he (defendant) owned the horse and inquiring about its condition, and saying that an uncle of Devereux would pay his bill. After the horse died plaintiff's attorney wrote defendant demanding payment of the bill. Defendant answered, "Please not make any costs on it (the bill) as I will call and settle the same soon." Plaintiff's attorney thereupon wrote

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defendant saying he would wait. After waiting awhile, in pursuance of this arrangement, payment not being made, this suit was brought. Defendant denies his liability to pay for the expenses of his horse thus incurred, and contends that there was no valid consideration for his express promise to do it. Unless there was an original liability on his part by reason of the circumstances and acts of the parties while the plaintiff was furnishing the care and board of the horse, it may well be doubted whether a valid consideration is shown for the promise in defendant's letter to the attorney.

We do not find it necessary to decide that question, for as the case is stated, we think, upon natural and legal presumptions, it is made to appear that the plaintiff might well charge the keeping of the horse to its owner, and that the defendant would be liable for the bill without any express promise.

The first inquiry is, what were the respective rights and duties of the defendant and Devereux under the circumstances disclosed?

"If a man hires a horse," remarks LUMPKIN, J., in *Mayor of Columbus v. Howard*, 6 Ga. 213, "he is bound to ride it moderately and to treat it as carefully as any man of common discretion would his own, and to supply it with suitable food." Thus doing, if the animal falls sick or lame, without any want of ordinary care on the part of the hirer, he is not responsible to the owner for the consequences. The owner of the animal must bear them.

But if the horse falls sick or becomes exhausted the hirer is bound not to use it. And if he does pursue his journey and use it when reasonable care and attention would forbid, he would make himself responsible to the owner for that act. *Bray v. Mayne*, Gow. 1 (5 E. C. L. R. 437).

On the other hand, one who lets a horse impliedly undertakes that the animal shall be capable of performing the journey for which he is let, and if without the fault of the hirer he becomes disabled by lameness or sickness, so that the hirer is compelled to incur expense to procure other means of returning, such expense may be recouped against the demand of the bailor for the services. *Harrington v. Snyder*, 3 Barb. 880.

Upon whom, then, as between Devereux and the defendant, should the expense of keeping and caring for the defendant's horse, which "became diseased and sick while in Devereux's hands," fall? Up to the time when he fell sick it was Devereux's business to furnish him at his own proper expense with "meat for his work." But how was

it when he could no longer lawfully use him under his contract? Unless the horse was disabled through some fault or neglect of Devereux, the owner is the one who bears the burdens occasioned by his failure to perform the work for which he was hired, and among them would be the expense of the care and cure of the animal—an expense which enures directly to his benefit. There would be good reason for holding that in such case the hirer is, *ex necessitate*, the agent of the owner to procure such reasonable and necessary sustenance and farrier's attendance as might be required until the animal could be got home; for while the hirer is not responsible for any mistakes which a regular farrier whom he calls in may make in the treatment of the animal, still, if instead of applying to a farrier, he undertakes to prescribe for the beast himself, and by his unskillfulness does it a mischief, he assumes a new degree of responsibility, and becomes liable to the owner for the result of any want of such care as a man of ordinary prudence would take of his own horse. *Deane v. Keate*, 3 Camp. 4.

But it is unnecessary in this case to determine the extent of the hirer's authority as agent for the owner, for the report shows that while plaintiff was keeping the horse defendant wrote to him mentioning his ownership and inquiring as to the condition of the animal. Since he thus knowingly availed himself of the plaintiff's services and outlay in the premises, the law will imply a promise on his part to do what was right and pay the plaintiff for them. Nor could the fact that he gave the plaintiff an assurance that Devereux's uncle, who was certainly under no legal obligation so to do, would pay the bill, make any difference with regard to plaintiff's right to charge the keeping of the horse to its owner who knew he was keeping it. "The horse became diseased and sick while in Devereux's hands." There is nothing here to show that it was by the fault of Devereux. The language used rather indicates the contrary, and the legal presumption is against it. Negligence and misdoing are not to be presumed, but there must be some positive evidence of them. *Cooper v. Barton*, 3 Camp. 5; *Tobin v. Morrison*, 9 Jur. 907. It is not enough to show that the horse became disabled, but he must show that he became so by the fault of the hirer. *Harrington v. Snyder*, *ubi supra*.

It is not the case of property, while in the possession of a bailee for hire, receiving an injury, which could not ordinarily occur without negligence on the part of the custodian, when it would be for

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him to show that the injury was not caused by his negligence. *Coltins v. Bennett*, 46 N. Y. 490.

We think the case as stated shows a good consideration for an implied promise on the part of defendant to reimburse the plaintiff for his outlay in defendant's behalf. Hence, perhaps, defendant's readiness to promise payment if he could have a little delay.

Defendant defaulted.

APPLETON, Ch. J., WALTON, DANFORTH, PETERS and LIBBEY, JJ., concurred.

SMALL V. ROBINSON.

(39 Me. 425.)

Bailment—lien for repairs imposed by bailee.

The bailee of personal property can impose no lien for repairs on the property bailed, as against the owner, without his knowledge and consent.

REPLEVIN. The opinion states the facts. The plaintiff had judgment below.

G. F. Gould, for plaintiff.

S. C. Andrews and *A. F. Moulton*, for defendant. The defendant had a common-law lien as mechanic, upon the property for repairs; the whole purpose of the lien at common law is to benefit trade by insuring to the workman his pay. *Grinnell v. Cook*, 3 Hill. 491. If an agent has a valid lien, the owner cannot maintain replevin. *Newhall v. Dunlap*, 14 Me. 180. The defendant was in possession; he had increased the value of the property by his labor and materials furnished, and at the instance and direction of the owner, or his implied and authorized agent. *Abbot v. Hermon*, 7 Me. 118; *Weston v. Davis*, 24 id. 374; Story Agency, 5th ed., § 56.

APPLETON, Ch. J. This is an action of replevin for a pair of wheels and other parts of a hack, upon which the defendant claims a lien, by reason of work done by him upon them.

The plaintiff is the owner of the hack. It was left for repairs by

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one Staples, who was in possession under a contract of purchase, the terms of which were unperformed. The defendant was aware of the plaintiff's title. The presiding justice found that the plaintiff had never given Staples any authority to subject the hack to a lien for repairs, and ruled that no such authority was to be implied as a matter of law, from the relation of the parties.

"A lien," observes SHAW, Ch. J., in *Hollingsworth v. Dow*, 19 Pick. 228, "is a proprietary interest, a qualified ownership, and in general, can only be created by the owner, or by some person by him authorized." Here the fact of authority is negatived. The plaintiff never became the debtor of the defendant, and never authorized the imposition of any lien on his property. *Globe Works v. Wright*, 106 Mass. 207. A mortgagor of horses cannot, without the knowledge, acquiescence and consent of the mortgagee, intrust the horses to be boarded so as to subject them to a lien for keeping, as against the mortgagee. *Sargent v. Usher*, 55 N. H. 287; S. C., 20 Am. Rep. 208. CUSHING, Ch. J., in the case last cited, says: "I have seen no case in which it has been held that a party who permits another to have possession of his personal property, by so doing in law, constitutes that other his agent to sell or pledge the property." So a bailee can give no lien upon property bailed, as against the owner. *Gilson v. Gwinn*, 107 Mass. 126.

The defendant could acquire no title from Staples, when he had none.

The exceptional case of the inn-keeper rests upon the principle that as he is by law bound to receive a guest and his goods, and might be liable to indictment for not so receiving them, he shall have a lien on such goods as he is bound to receive whether owned by his guest or not.

Exceptions overruled.

WALTON, BARROWS, VIRGIN and LIBBEY, JJ., concurred.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

EDWARDS v. ALLOUEZ MINING COMPANY.

(38 Mich. 46.)

Injunction against a provoked injury.

A man bought for speculation certain bottom lands upon which large quantities of sand were being deposited by a stream which operated a mill above. He put an exorbitant valuation on the land, and tried to sell it to the proprietors of the mill, but they declined to buy it. He then prayed for an injunction to restrain them from sanding the land and polluting the stream. *Held*, that an injunction would not lie, as he had invited the injury.

INJUNCTION. The opinion states the case. The writ was denied below.

Ball & Owen and *G. V. N. Lothrop*, for complainant. Injunction to restrain a permanent injury to a man's land is a settled method of equitable relief. High. on Inj. § 485; 2 Story's Eq. Jur. § 928; Wood on Nuisances, 308, 353, 354; Hilliard on Inj. 280, n. a.; *Livingston v. Livingston*, 6 Johns. Ch. 497; 8 Am. Dec., 562; *McCord v. Iker*, 12 Ohio, 387. Continuous flowing of water, sand and slime upon land, destroying its timber and unfitting it for cultivation is a substantial appropriation of the land, and no remedy is complete which does not restrain it. *Tyler v. Wilkinson*, 4 Mason, 397; *O'Riley v. McChesney*, 8 Lans. 282; *White v. Forbes*, Walk. Ch. 412; *Dickinson v. Canal Co.*, 9 Eng. L. and Eq. 513; *Gardner v.*

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Newburgh, 2 Johns. Ch. 161; 7 Am. Dec. 526; *Wood v. Waud*, 3 Exch. 748; *Hendrick v. Cook*, 4 Ga. 241; *Van Bergen v. Van Bergen*, 3 Johns. Ch. 282; 8 Am. Dec. 511; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 519; *Hammond v. Fuller*, 1 Paige, 197; *Corning v. Troy I. and N. Factory*, 40 N. Y. 191; 2 Story's Eq. § 929 b.

W. D. Williams, for defendant in error.

COOLEY, J. This is an injunction bill, and the facts are very simple. Defendant at a cost of some \$60,000 erected a stamp mill on the bank of Hill creek in the year 1874, and has since been operating it for copper mining purposes. As a result of its operations large quantities of sand are carried down by the waters of the stream and deposited on the bottom lands below. The evidence leads to the belief that it would be impossible to carry on the mining operations of the defendant with profit unless this is permitted. The year following the erection of defendant's mill, complainant purchased a piece of land through which the creek runs a short distance below the mill, and upon which the mill, as operated, was depositing sand. The land was not purchased for use or occupation, but as a matter of speculation, and apparently under an expectation of being able to force defendant to buy it at a large advance on the purchase-price. It was offered to defendant soon after the purchase, and though no price was named, the valuation which has been put upon it by complainant and his witnesses is from three to five times what it cost him, and this perhaps gives some indication what his expectations were. The real value of the land, except as a convenience in the business of defendant, would seem to have been small. When defendant declined to purchase, this bill was filed. The prayer is that defendant be restrained from running or depositing its stamp sand on complainant's land, and from polluting the waters of the stream by its operations. This is a short statement of so much of the case as is material to what follows. The circuit judge refused the injunction prayed for, but ordered a reference to a jury for an assessment of damages.

There is no doubt that the operations of defendant, whether they inflict any serious injury on complainant or not, amount in effect to an appropriation of that portion of his property upon which sand is being deposited. *Ashley v. Port Huron*, 35 Mich. 296; *Pumpelly v. Green Bay Co.*, 13 Wall. 166; *Arimond v. Green Bay Co.*, 31 Wis.

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316; *Rowe v. Portsmouth*, 56 N. H. 291; *Woodward v. Worcester*, 121 Mass. 245. It follows, and is beyond question, that complainant sustains a legal injury for which he is entitled to suitable redress. The only question on this record is, whether he is entitled to the special redress he seeks, namely, an injunction.

An injunction is not a process to be lightly ordered in any case. Where the effect will be to present to the owners of a valuable mill the alternative either to purchase complainant's lands at his own price or to sacrifice their property, any court having the power to order it ought very carefully to scrutinize the case and make sure that equity requires it. In theory its purpose is to prevent irreparable mischief; it stays an evil, the consequences of which could not adequately be compensated if it were suffered to go on. *Gilbert v. Showerman*, 23 Mich. 448; *Bemis v. Upham*, 13 Pick. 169; *Wason v. Sanborn*, 45 N. H. 169; *Cockey v. Carroll*, 4 Md. Ch. 344; *Nicodemus v. Nicodemus*, 41 Md. 529; *Burgess v. Kattleman*, 41 Mo. 480; *Owen v. Ford*, 49 id. 436; *Morris, etc., Co. v. Central R. R. Co.*, 16 N. J. Eq. 419; *Pettibone v. La Crosse, etc., R. R. Co.*, 14 Wis. 443; *Hine v. Stephens*, 33 Conn. 497; *Rhodes v. Dunbar*, 57 Penn. St. 274; *Richards Appeal*, id. 105; *Harkinson's Appeal*, 78 id. 196; *S. C.* 21 Am. Rep. 9; *State v. Judge*, 16 La. Ann. 233; *Goodell v. Lassen*, 69 Ill. 145. The writ "is not *ex debito justitiæ*, for any injury threatened or done to the estate or rights of a person, but the granting of it must always rest in sound discretion, governed by the nature of the case." *Enfield Toll Bridge Co. v. Connecticut River Co.* 7 Conn. 50. As is said in another case: "Injunction is not of right but of grace; and to move an upright chancellor to interpose this strongest arm of the law, he must have not a sham case, but a well-grounded complaint, the *bona fides* of which is unquestioned, or capable of vindication if questioned." *Kenton v. Railway Co.* 54 Penn. St. 401. "There is no power," says Mr. Justice BALDWIN, "the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or is more dangerous in a doubtful case than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended unless to cases of great injury where courts of law cannot afford an adequate or commensurate remedy in damages." *Bonaparte v. Camden, etc., R. R. Co.*, Bald. 218. All the cases referred to show that the court looks beyond the actual injury to contemplate the consequences, and however palpable may be the wrong, it will still balance the inconveniences of award-

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ing or denying the writ, and adjudge as these may incline the judicial mind. *Grey v. Ohio, etc., R. R. Co.*, 1 Grant, 412; *Varney v. Pope*, 60 Me. 192; *Bosley v. M'Kim*, 7 Har. & J. 468. Even in the case of a palpable violation of a public right to the annoyance of an individual, he must show the equity which requires this summary interference as the only adequate means of obtaining justice. *Sparhawk v. Union Passenger Railway Co.*, 54 Penn. St. 401.

What is the irreparable injury which is done or threatened in this case? We can see very plainly what it is in the case of many nuisances, and the equity of this particular remedy is then very manifest. If one man creates intolerable smells near his neighbor's homestead, or by excavations threatens to undermine his house, or cuts off his access to the street by buildings or ditches, or in any other way destroys the comfortable, peaceful and quiet occupation of his homestead, he injures him irrevocably. No man holds the comfort of his home for sale, and no man is willing to accept in lieu of it an award of damages. If equity could not enjoin such a nuisance the writ ought to be dispensed with altogether, and the doctrine of irreparable mischief might be dismissed as meaningless. A nuisance which affects one in his business is less in degree, but it may still be irreparable, because it may break up the business, destroy its good-will and inflict damages which are incapable of measurement because the elements of reasonable certainty are not to be obtained for their computation. Even in the case of unoccupied land a nuisance may threaten irreparable injury, where it is devoted in its purchase to some special use, or where the person causing the nuisance is irresponsible, and in some other cases which need not here be specially mentioned.

The land injured in this case was bought by the complainant with a preconceived purpose to force a sale of it upon the defendant. He did not want it for a homestead or for business property, but for the money he could compel the defendant to pay for it. It may be said that no one is concerned with the motives of another in making a lawful purchase, or in doing any other lawful act; and this is true as a rule, but it is not true universally. Wherever one keeps within the limits of lawful action, he is certainly entitled to the protection of the law, whether his motives are commendable or not; but if he demands more than the strict rules of law can give him, his motives may become important. In general it must be assumed that the rules of the common law will give adequate redress for any injury; and

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when the litigant avers that under the circumstances of his particular case they do not, and that therefore the gracious ear of equity should incline to hear his complaint, it may not be amiss to inquire how he came to be placed in such circumstances. If a man invites an injury, he may still have his redress in the courts of law, but his prayer for the special interposition of equity on the ground that what he invited and expected was about irreparably to injure, would not be likely to trouble the judicial conscience very much if it were wholly ignored. The Supreme Court of Connecticut not long since felt compelled, under circumstances very similar to those shown by this record, to look into the motives of a corporation in making a purchase with a view to litigation, and to deny relief upon the ground that an acquisition of land for such a purpose was *ultra vires*. *Occum Co. v. Sprague Manufacturing Co.*, 34 Conn. 540. We cannot say in this case that complainant had no right to buy, but we can say, as we do, that when he comes demanding strict legal rights, he shall have those, but no more. He is entitled to his rights under the rules of law, but he is entitled to nothing of grace.

The land having been bought to make money from by sale, a legal award of damages for an injury to it, is in furtherance of the purpose of the purchase, and therefore a suitable and a just redress. Defendant is not alleged to be irresponsible, and a jury it is supposed will award all that is reasonable. If complainant wants more than is reasonable, he has a right to obtain it under the rules of law, but he cannot demand the aid of equity in a speculation. If in speculative language he has a corner in real estate, there is no greater reason why he should have the assistance of an injunction to aid his schemes than there would be if on the produce exchange he had effected a corner in grain. Without the writ in either case he may be the sufferer, but he suffers nothing for which damages cannot compensate him. The elements of irreparable injury are entirely wanting to his case.

Our conclusion is that the Circuit Court gave the complainant all he was entitled to when the case was sent to a jury. The decree must therefore be affirmed with costs.

GRAND RAPIDS AND INDIANA R. R. CO. v. HEISEL.

(38 Mich. 63.)

Damages — railway in public street — abutting owner.

An abutting owner, who does not own the soil of the street, cannot recover for any injury to his freehold resulting from the presence of a steam railway in the street, but only for damages resulting from such misconduct in its management as amounts to a nuisance, as leaving cars standing an unreasonable time, unnecessary noises and dangerous speed.

TRESPASS. The opinion states the case. The plaintiff had judgment below.

Hughes, O'Brien & Simley, for plaintiff in error.

Thompson & Pratt, for defendant in error. The presumption that an adjacent proprietor owns to the middle of the street is not rebutted by the fact that his title-deed bounds his property by the line of the street, *Moody v. Palmer*, 50 Cal. 31; *Champlin v. Pendleton*, 13 Conn. 23; *Purkiss v. Benson*, 28 Mich. 538; *Peck v. Smith*, 1 Conn. 103; 6 Am. Dec. 216; *Bissell v. N. Y. Cen. Ry. Co.*, 23 N. Y. 61; *Paul v. Carver*, 26 Penn. St. 223; nor by showing a qualified fee in the county, *Kimball v. Kenosha*, 4 Wis. 321; but in any case he would have a substantial interest in the soil as appurtenant to the land and would have a right of action for an injury to it; *Haynes v. Thomas*, 7 Ind. 38; *Tate v. O. and M. R. R. Co.*, id. 473; *Schulte v. N. P. T. Co.*, 50 Cal. 592; *Lackland v. N. M. Ry.*, 31 Mo. 180. Railroad tracks in the street are a public nuisance. *Springfield v. C. R. Ry.*, 4 Cush. 71; *Com. v. N. and L. Ry.*, 2 Gray, 56; *Com. v. O. C. and F. Ry.*, 14 id. 93; *Com. v. V. and M. Ry.*, 4 id. 22; *Railway Co. v. Smith*, 49 Me. 9. As to the rule of damages see *Troy v. Cheshire R. R. Co.*, 23 N. H. 83; *Ill. Cen. R. R. Co. v. Grabill*, 50 Ill. 241; *Railway Co. v. Capps*, 67 id. 607; *Del. and R. Ry. Co. v. Wright*, 1 Zab. 469; *Hatfield v. Cen. Ry.*, 33 N. J. 251; *Stone v. Bumpus*, 40 Cal. 428; *Hopkins v. Railroad*, 50 id. 191; *Davis v. Railroad*, 12 Wis. 16; *Sherman v. M. L. S. and W. Ry. Co.*, 40 id. 645.

Grand Rapids and Indiana Railroad Company v. Heisel.

COOLEY, J. Mrs. Heisel sued the railroad company in case for an injury suffered by her as owner of a lot situated on West Division, formerly Seward street, in the city of Grand Rapids. The injury complained of was one resulting from an occupation of the street in front of plaintiff's premises by the main track of the railroad, and also by a side track upon which cars were often left standing. Plaintiff occupied the lot as a homestead, and special damages were claimed not only for the inconvenience of access to the lot caused by the running and keeping of cars in the street, but also for the discomfort occasioned by the smoke, dust, noise, etc., from the engines and carriages. Mrs. Heisel bought the land in 1868, after the railroad track had been laid in the street, but before the side track had been put in. The description in her conveyance was as follows:

"The following described piece or parcel of land lying and being situate in the city of Grand Rapids, Kent county, and State of Michigan, to wit: Commencing at a point where the continuation of the north line of Second street of Scribner and Turner's addition to the city of Grand Rapids would intersect the east line of Seward street; thence running north on the line of said Seward street one hundred feet; thence east parallel to said line of Second street one hundred feet; thence south parallel to the line of Seward street one hundred feet to the north line of said Second street; thence west along the line of Second street one hundred feet to the place of beginning."

Upon the trial the plaintiff gave evidence tending to show that she was specially incommoded by the running of the cars in the street, and particularly by cars being left standing on the side track; that the smoke, noise, smells, etc., made the neighborhood unhealthy and unpleasant; that her own health received injury therefrom, and that the market value of her premises was greatly decreased in consequence of the use of the street by the railroad company. The defendants gave evidence of a permission which had been granted to them by the city to lay their tracks in the street, and it is not questioned here that that permission was lawfully given, but a question arises upon it which will be considered further on. The defendants also claimed that the plaintiff had no title to the lands embraced within the limits of the street, but the circuit judge held that whether she had or not was immaterial. He also instructed the jury in respect to damages as follows:

"The plaintiff claims that by reason of the injury she has lost

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certain rental of the lot which had a house on it as claimed; and second, it is claimed that the plaintiff has been injured in health, and has been annoyed by the running of trains, and standing of cattle cars on the side-track, for which trouble and annoyance she claims to recover some damages; and third, the decreased value of the premises by reason of the road and side-track are claimed as damages. In my judgment the plaintiff may recover upon all three of these claims for damages, provided that you find as a fact that such damages have been actually sustained by the plaintiff."

One question which it becomes necessary to notice in the case, relates to the permission which was given by the city authorities for the occupation of the street with railroad tracks. Under the general railroad law now in force a railroad company with such permission is not allowed to construct its road in a public street until "damages and compensation be made" to the adjoining owners. General Railroad Law, 1 Sess. L. 1873, p. 505; act 198, art. 2, § 9, sub. 5. The track of the company was laid in the street in 1868, before the plaintiff became owner of her lot. No formal permission for the occupation of the street was given by the city authorities until 1873, which was after the plaintiff had purchased and gone into occupation. No compensation has been made by defendant to the adjoining owners, but as no statute made such compensation a condition precedent to the occupancy of the street, at the time it began, and as the city then imposed no conditions, I cannot see how that fact can make the occupation which was tacitly permitted, illegal. Nevertheless the right of the plaintiff to recover compensation in some form, if she was ever entitled to any, is not affected by what has taken place; if she has rights in the street which are property rights, or if as respects the enjoyment of her lot she suffers any deprivation of right through the occupation of the street by the railroad company, she is, I think, entitled to recover compensation by suit, to the same extent that she would have been entitled to demand it had she been owner before the track was laid and demanded it in advance. Her right, however, must be tested by common-law rules; the statute does not undertake to prescribe for what the adjoining owners shall be compensated, nor, as we understand it, to enlarge their common-law rights.

What rights the adjoining owner has in the public streets is the question; and I cannot resist the conclusion that the circuit judge was in error when he instructed the jury that it is immaterial

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in this controversy whether the plaintiff's ownership extended to the center of the street or was restricted to the limits actually included in the boundaries given in her deed; in other words, that it is immaterial whether the railroad company has actually appropriated her land, or has only interfered with her enjoyment of the public easement.

It is, to my mind at least, doubtful whether it is competent for the public authorities to bind the interests of individuals by any consent they may give to the occupation for railroad purposes of a public highway, when the land over which the highway is laid is owned by private parties. If the railroad were only a city railway constituting a mere local convenience, and calculated to relieve the pressure of traffic and travel upon the street, the question, of course, would be different. There are cases which hold it to be competent under proper legislative authority, to permit a street railway track to be laid, regardless of the consent or of the wishes of abutting proprietors who may own the soil of the street. A street railway for local purposes, so far from constituting a new burden, is supposed to be permitted because it constitutes a relief to the street; it is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel instead of constituting an embarrassment. It is for this reason that the owners of lands over which a city street is laid are denied compensation if a street railway is subsequently authorized within it; if they were compensated for the taking of their land originally, they are supposed to be compensated for all possible losses they may suffer from its being put to proper uses as an avenue of local trade and passage, and if without compensation they dedicated it to the public, they are supposed to have contemplated and assented to all such uses. They have, therefore, no ground for complaint when the new convenience is brought into use; and I apprehend one would not be permitted to show that in his particular case the street railway was an injury rather than a benefit. It is enough that the use of the street for a city railway is a proper use, and therefore a lawful use; being such, it can give rights of action to no one. Such appear to be the conclusions of the courts. *Brooklyn City, etc., R. R. Co. v. Coney Island, etc., R. R. Co.*, 35 Barb. 364; *Brooklyn Central, etc., R. R. Co. v. Brooklyn City, etc., R. R. Co.*, 33 id. 420; *People v. Kerr*, 27 N. Y. 188; *New Albany and Salem R. R. Co. v. O'Daily*, 12 Ind. 551; *Brown v.*

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Duplessis, 14 La. Ann. 842; *Elliott v. Fair Haven, etc., R. R. Co.* 32 Conn. 579; *Hobart v. Milwaukee City R. R. Co.*, 27 Wis. 194.*

But we cannot say the same in the case of the ordinary railroad. It is not usual for such a road to be laid in one of the public highways, and the cases in which it is permitted are exceptional. For that reason, therefore, if for no other, the owner whose land is taken for a highway, whether in town or country, cannot be understood to have assented to its being appropriated, either wholly or in part to railway purposes at the discretion of the public authorities, and to have been compensated for such appropriation. Neither can the use of the highway for the ordinary railway be in furtherance of the purpose for which the highway is established, and a relief to the local business and travel upon it; the two uses on the other hand, come seriously in conflict; the railroad constitutes a perpetual embarrassment to the ordinary use, which is greater or less in proportion to the business that is done upon it and the frequency of trains. When, therefore, the country highway or the city street is taken for the purposes of a railroad company engaged in the business of transporting persons and property between distant points, the owner of the soil in the highway is entitled to compensation, because a new burden has been imposed upon his estate, which affects him differently from the original easement, and may be specially injurious. "The right of way, the road-bed and the carriages propelled thereon are owned by private individuals, and not by the public. Fares are charged for travel thereon for the exclusive benefit of the parties owning the road. They are constructed and equipped in the interest of private speculation, but at the same time they are intended to subserve the public good. The travel on them bears no analogy to our notions of travel on an ordinary street or highway, where everyone travels at pleasure in his own conveyance, without paying tolls or fares. The uses are totally different and even inconsistent." *Indianapolis, etc., R. R. Co. v. Hartley*, 67 Ill. 439, 444; *S. C.*, 16 Am. Rep. 624, per Scott, J., following and repeating to some extent SHAW, Ch. J., in *Springfield v. Conn. R. R. Co.*, 4 Cush. 63. To the same effect see *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178, 189, per DOWNEY, J. The following cases sustain and illustrate the same view: *Presbyterian Society v. Auburn, etc., R. R. Co.*, 3 Hill, 567; *Williams v. New York Central R. R. Co.*, 16 N. Y. 97; *Wager*

* To same effect, *Attorney-General v. Metropolitan R. Co* (185 Mass. 515), 26 Am. Rep. 264. See, also, note, p. 269.

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v. Troy, etc., R. R. Co., 25 id. 526; *Nicholson v. N. Y. and N. H. R. R. Co.*, 22 Conn. 83; *Imlay v. Union Branch R. R. Co.*, 26 id. 249; *Mahon v. N. Y. Central R. R. Co.*, 24 N. Y. 658; *Haynes v. Thomas*, 7 Ind. 39; *Tate v. O. and M. R. R. Co.*, id. 480; *Kimball v. Kenosha*, 4 Wis. 321; *Ford v. Chicago, etc., R. R. Co.*, 14 id. 809; *Pomeroy v. Milwaukee, etc., R. R. Co.*, 16 id. 640; *Hegar v. Chicago, etc., R. W. Co.*, 26 id. 624; *Sherman v. Milwaukee, etc., R. R. Co.*, 40 id. 645.

In such a case it cannot be questioned that the laying of the railroad track in the highway without first legally appropriating the land for the purpose, and without making compensation, is a legal wrong to the adjacent owner (the track as to him is wrongfully laid), and whether he proceeds to have compensation assessed in the manner provided by law when lands are appropriated under the right of eminent domain—if provision is made that meets the case—or brings a common-law action, he is entitled to recover such damages as he can show he has suffered by reason of the appropriation. And in such a case his injury is not confined to the inconvenience he is put to in making use of the public easement; but as the railroad wrongfully incumbers his freehold, he may recover for any injury the incumbrance causes. The decrease in rental value and in the market value of his lot are legitimate items of damage in such a case; and so are the annoyances to business or to family occupation which the operations of the railroad company may cause. *Mix v. Lafayette, etc., R. R. Co.*, 67 Ill. 319. Indeed the general principles on which damages would be assessed in such a case would be the same that they would have been had no highway previously existed, and the existence of the highway would only be a circumstance tending to diminish the recovery.

But other principles must be applied when the abutting owner is not the owner of the soil in the street. In that case his freehold is not appropriated, and the mere laying of the track in the street—in the absence of any statute giving him redress therefor—is no wrong to him whatever. He is not wronged until the use of a street becomes a nuisance to him, or specially incommodes him in the enjoyment of the public easement. He is entitled to no assessment of damages, because none of his land is taken, and he has no action at the common law unless upon such grounds as would enable one land proprietor to sue an adjoining proprietor for failing to observe the maxim that every one must so use his own property as not

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unreasonably to incommode his neighbor. The damage establishes the wrong, and must be shown in every case.

An adjoining proprietor can never be entitled to recover from a railroad company for the depreciation in the rental or sale value of his premises, because of the location of the track in the street, except upon the assumption that the location is of itself unlawful. As already stated, it is unlawful as to him if he owns the soil in the street; but if he does not, and the placing of the track there is permitted by competent authority, the incidental injuries he may suffer, from the location of the track and from the proper and reasonable conduct of the business of the railroad company upon it, can afford no ground of action unless the statute gives one. In that particular he is on the same footing with all the rest of the community; he may have the incidental benefits without compensation, and he must submit to the incidental losses without redress. The railroad is not a public nuisance, and no right of action can arise against the company until by negligence or improper management they do or suffer to be done something injurious to the abutting proprietor which the permission to occupy the street would not justify. The general principle here stated has been recognized in the following cases: *Moses v. Pittsburg, etc., R. R. Co.*, 21 Ill. 516; *Murphy v. Chicago*, 29 id. 279; *Stetson v. Chicago, etc., R. R. Co.*, 75 id. 74; *Chicago, etc., R. R. Co. v. McGinnis*, 79 id. 269; *Elizabethtown, etc., R. R. Co. v. Combs*, 10 Bush, 382; *S. C.*, 19 Am. Rep. 67; *Carson v. Central R. R. Co.*, 35 Cal. 325; *Porter v. North Missouri R. R. Co.*, 33 Mo. 128. It is a legal solecism to call that a public nuisance which is permitted to competent authority. *Harris v. Thompson*, 9 Barb. 350; *Danville, etc., R. R. Co. v. Commonwealth*, 73 Penn. St. 29, and cases cited. The nuisance, whether it be public or private, must be found in the subsequent misconduct of the railroad company, and not in their acceptance of the permission to occupy the highway.

But every lot owner has a "peculiar interest in the adjacent street which neither the local nor the general public can pretend to claim; a private right in the nature of an incorporeal hereditament legally attached to his contiguous ground; an incidental title to certain facilities and franchises," which is in the nature of property, and which can no more be appropriated against his will than any tangible property of which he may be owner. *Lexington, etc., R. R. Co. v. Applegate*, 8 Dana, 294; *Elizabethtown, etc., R. R. Co. v. Combs*, 10 Bush. 382; *S. C.*, 19 Am. Rep. 67; *Haynes v. Thomas*, 7 Ind. 38;

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Protzman v. Indianapolis, etc., R. R. Co., 9 id. 467; *Stone v. Fairbury, etc., R. R. Co.*, 68 Ill. 394; *S. C.*, 18 Am. Rep. 556. A railroad company with its track in the street may injure the lot owners by ways innumerable; by acts of omission and of commission; and some such acts are charged against the defendant in this case. To leave its cars standing in front of the plaintiff's premises for an unreasonable time is a plain violation of her rights; and so might be unnecessary noises, and the running of trains at an unwarrantable speed. As the principles which would govern the case are the same which must be applied in the case of nuisances in general, it is quite unnecessary to attempt any catalogue of acts which might constitute legal grievances; the attempt could be but imperfectly carried out because of the impossibility of anticipating all the ways in which one person may unlawfully annoy another. But in no action grounded upon such an injury could the diminution in the value of the plaintiff's estate constitute a measure of damages. The reason is obvious. In so far as that diminution has been occasioned by the placing of the track in the street, it is *damnum absque injuria*; and in so far as it comes from an abuse of railroad privileges in the street, it cannot be regarded as permanent in its nature, because it cannot be assumed that the abuses will be permanent. The defendant may indeed repeat them, notwithstanding a recovery for wrongs already done; but the repetition only gives rise to a new cause of action; in advance it cannot be assumed as matter of legal certainty that it will take place. It is clear, therefore, that the principles governing the recovery must be quite different when the plaintiff's freehold is appropriated and when it is not.

I am inclined to the opinion that a correct interpretation of the plaintiff's deed must confine the land granted within the boundaries given and exclude the street altogether. The general rule which carries a grant bounded on a highway to the center line thereof is familiar and is not questioned; but the terms of this grant appear to indicate an intent that the general rule shall not apply. In *Smith v. Slocomb*, 9 Gray, 36, a very similar description, beginning and terminating in one of the sides lines of a highway was held not to embrace any part of the land over which the highway was laid. Like decisions were made in *Sibley v. Holden*, 10 Pick. 249, and *Phillips v. Bowers*, 7 Gray, 21; *Hughes v. Providence, etc., R. R. Co.*, 2 R. L. 508; *Hoboken Land Co. v. Kerrigan*, 31 N. J. Law, 13; *Anderson v. James*, 4 Rob. 35. In *Morrow v. Willard*, 30 Vt. 118,

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120, it is said that "if the deed bounds the grantee on a highway, and there is nothing in the deed which can control the general boundary, it carries the grantee to the center of the highway; such being its legal construction. If, however, the boundary had been the north line of the highway, the construction would have been otherwise." Similar language is used in *Moody v. Palmer*, 50 Cal. 31. In *Starr v. Child*, 5 Den. 599, a like rule was applied to a conveyance of land bounded on the bank of a stream, and this decision is followed in *Halsey v. McCormick*, 13 N. Y. 296; and see *Nickerson v. Crawford*, 16 Me. 245; *Rockwell v. Baldwin*, 53 Ill. 19. In the very important case of *Howard v. Ingersoll*, 13 How. 381, a like view is taken of a boundary on a stream.

I do not consider it important in this case to examine into the nature of the fee which is to be vested in the county when under our statute the proprietor of lands lays out a town plat. That subject has been considered somewhat in *Wayne County v. Miller*, 31 Mich. 447, and *Paul v. Detroit*, 32 id. 108, but is unimportant to this case, first, because no platting is shown, and second, because, as I think, the terms of the plaintiff's deed exclude the highway.

I think the judgment should be reversed, with costs, and a new trial ordered.

CAMPBELL, Ch. J., and GRAVES, J., concurred. MARSTON, J., did not sit.

 JONES V. DETROIT CHAIR COMPANY.

(38 Mich. 92.)

Fixtures — when subject to mortgage.

Lessees of a manufactory put in fixed machinery, and afterward bought the premises subject to a mortgage of the realty, including "buildings to be erected thereon." *Held*, that the machinery so put in by them came under the lien of the mortgage.*

FORECLOSURE. The opinion states the facts. The plaintiff had judgment below.

Geo. H. Lothrop and *G. V. N. Lothrop* for complainant. Machinery necessary to the equipment and operation of a foundry, mill,

* See contra: *Globe Marble Mills Co. v. Quinn*, 76 N. Y. 22.

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machine-shop or factory, and connected with its permanent motive power, is a fixture. *Voorhis v. Freeman*, 2 W. & S. 116; *Pyle v. Pennock*, id. 390; *Christian v. Dripps*, 28 Penn. St. 271; *Wadleigh v. Janvrin*, 41 N. H. 503; *Burnside v. Twitchell*, 43 id. 390; *Farrar v. Stackpole*, 6 Greenl. 157; *Parsons v. Copeland*, 38 Me. 537; *Tabor v. Robinson*, 36 Barb. 483; *Walker v. Sherman*, 20 Wend. 653; *Snedeker v. Warring*, 12 N. Y. 170; *Walmsley v. Milne*, 7 J. Scott (N. S.), 130; *Longbottom v. Berry*, L. R. 5 Q. B. 123. So is rolling stock. *Pennock v. Coe*, 23 How. 117; *Minn. Co. v. St. Paul Co.*, 2 Wall. 609; *Pierce v. Emery*, 32 N. H. 484; *Titus v. Mabee*, 25 Ill. 257. And generally, where the machinery is put in by the owner of the building, with intent to make it a permanent part of it. *Capen v. Peckham*, 35 Conn. 94; *Hill v. Sewald*, 53 Penn. St. 271; *Bishop v. Bishop*, 11 N. Y. 123; *Murdock v. Gifford*, 18 id. 31; *Potter v. Cromwell*, 40 id. 287; *Voorhees v. McGinnis*, 48 id. 282; *Tift v. Horton*, 53 id. 377; *Wood v. Hewett*, 8 Q. B. 913; *Climie v. Wood*, 3 L. R. Exch. 260; 4 id. 328. And it is covered by a mortgage on the building; *Hoskin v. Woodward*, 45 Penn. St. 42; *Potts v. N. J. Arms Co.*, 17 N. J. Eq. 404; *Lathrop v. Blake*, 23 N. H. 65; *Teaff v. Hewitt*, 1 Ohio St. 536; whether annexed before or after the mortgage was given. *Amer. Cigar Co. v. Foster*, 36 Mich. 368; *Elwell on Fixtures*, 282, and cases.

D. C. Holbrook (on brief), for defendant. Where the building and the machinery in it are not held by the same title, the machinery is not a fixture. *Adams v. Lee*, 31 Mich. 440.

MARSTON, J. Admitting, as claimed by defendant, that machinery put into a building by a tenant would not be subject to or affected by a real estate mortgage previously given by the lessor, yet this case as it now stands would not come within that rule. The mortgage in question describes the real estate, "together with the chair manufacturing establishment and buildings for the purpose to be erected thereon." At the time this mortgage was given, the erection of buildings and putting machinery therein for such manufacturing purposes was contemplated, and the loan was made to assist in accomplishing such purpose. The form of the mortgage shows that the parties intended it to cover the buildings afterwards to be erected and the machinery that should be placed therein, as such machinery was necessary and essential to carry out the primary and leading purpose of a "chair manufacturing establishment."

This, however, could not affect the rights of lessees of the premises, subsequently placing machinery in the buildings to enable them to carry on the chair manufacturing business. *Crippen v. Morrison*, 13 Mich. 28.

In this case the lessees, after putting in the machinery, purchased the reversion *subject to the mortgage*. They thereby united the title to the realty and fixtures in one and the same person. Upon the happening of this event the fixtures at once became subject to the terms of the mortgage, which by its terms had been made broad enough to cover them. As bearing upon this question see *Culwick v. Swindell*, 3 L. R. Eq. 249; *Frankland et al. v. Moulton*, 5 Wis. 1, 6; *Preston v. Briggs*, 16 Vt. 124.

The decree was correct and must be affirmed with costs.

The other justices concurred.

BEECHER V. PEOPLE.

(38 Mich. 280.)

Municipal corporation — obstruction to alley.

Alleys are not primarily designed as streets, but simply as a means of local convenience to a limited neighborhood, and a roof twelve or fifteen feet over and above an alley is not necessarily an obstruction.

CONVICTION of obstructing an alley. The opinion states the facts.

H. A. Baker, for plaintiff in *certiorari*.

W. C. Maybury, city attorney, for defendant. Placing a roof timber above a space in which the public has vested rights is an interference with its easement, even though it does not interfere with ordinary travel. *Rex v. Lord Grosvenor*, 2 Stark. 448; *Queen v. Betts*, 16 Q. B. 1022; *Rex v. Russell*, 6 East, 427; *Davis v. Mayor* 14 N. Y. 524; *Grove v. Fort Wayne*, 45 Ind. 429.

CAMPBELL, Ch. J. Beecher was complained of for "obstructing and encumbering" an alleged public alley in Detroit "with certain large

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timbers placed above and diagonally across said public space, at the height of fifteen feet or thereabouts above the ground level of said space."

The facts found by the Recorder's Court show that Beecher owns the land on either side of this space, from Woodbridge street to Detroit river, and is roofing it over at a height of about fifteen feet. The strip of land in question is sixteen feet wide, and was originally a part of the bed of Detroit river. While in this condition of land covered with water, it was marked, in 1831, on a plat made by the city, which then owned the tract, in the same manner as alleys were generally marked. The space was used by private parties as a passage for water-logs to furnish water to the citizens, and the city purchased these in 1834. In 1851 the owners of land adjoining on the east (now owned by Beecher) leased the end next to the river, and put in a box drain, at the expense of the city, to drain Woodbridge street and a block adjoining. The same owners, under a contract with the city, the terms of which are not found in full, filled up and planked this space as far as the end of their buildings. The finding concludes as follows: "This space was always considered and treated by the adjoining owners as belonging to the city; it was never assessed as private property; a public sewer was built through it about seven years since, and no objection was made to it by the adjoining owners. When Woodbridge street was paved, the city paid for the paving in front of this space, as being a public alley. The river front of this space was too narrow for large boats to land there and unload freight, but this was occasionally done by small sail boats and scows, and goods and baggage were conveyed from them over the slip without any charge." As to the question of obstruction, the court finds: "All the obstruction, if any, consists of two or three timbers, extending across said space from one side to the other, about twelve or fifteen feet from the ground." Upon this Beecher was adjudged guilty of the obstruction.

The object of the power granted to the city to prevent obstructions to various easements of a public character, is not to settle the title, which cannot be tried by a municipal court under city ordinances. *Horn v. People*, 26 Mich. 221; *Roberts v. Highway Com'rs of Cottrellville*, 25 id. 23.

Neither can any such interference in a summary proceeding be had except where some way actually used has been interrupted in its user or enjoyment. A theoretical easement not actually used is not within

the law. *Tillman v. People*, 12 Mich. 401; *Jackson v. People*, 9 id. 111.

In the present case the land could not originally have been an alley, because it was covered by open water. Its uses since, appear to have been for the passage under its surface of drains and water pipes, and as a wharf, or an appendage to a wharf. Under the facts found, the use of it as an alley has been for the convenience of adjoining property, and not for any public right of way. In these respects it comes within the principles of *Horn v. People* and *Tillman v. People* above cited. It can make no difference that the city may possibly own the fee; neither can the city try as a violation of an ordinance an invasion of its private property.

The finding, if otherwise correct, shows no obstruction. Assuming that alleys may under some circumstances involve public easements in the nature of ways, yet their primary purpose, even then, is not to be substitutes for streets, but to serve as means of accommodation to a limited neighborhood for chiefly local convenience. Nothing can be treated as a punishable obstruction that does not interfere with its accustomed uses. It cannot be said that covering it in by a roof is necessarily any obstruction whatever. There are many arcaded sidewalks which are a great convenience to foot passengers, and it can seldom happen that a roof twelve or fifteen feet high, can interfere seriously with any of the ordinary uses of an alley. In the present case the court did not find in fact that there was any obstruction, but decided it as a question of law — which it is not in most cases, if at all. The case of *Regina v. Betts*, 16 Q. B. 1022, is directly in point; see, also, *Clark v. Lake St. Clair, etc., Ice Co.*, 24 Mich. 508.

For these reasons the conviction must be quashed.

MARSTON and GRAVES, JJ., concurred. COOLEY, J., did not sit.

Covert v. Rogers.

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(33 Mich. 363.)

Assignment for benefit of creditors — by corporation to insolvent stockholder.

An insolvent corporation may make an assignment for the benefit of its creditors to one of its stockholders, who is insolvent, and who was the former treasurer, provided it is done in good faith; and evidence of the motives of the directors on that subject is admissible.

TROVER by the assignee of the Hubbardston Lumber Company, for assigned property attached by defendants as creditors of that company. The opinion states the facts. The plaintiff had judgment below.

Wells & Morse and *Mitchel & Pratt*, for plaintiffs in error. An assignment of the assets of a corporation for the benefit of its creditors to its business manager leaves the control of the property where it has been before, and seems to be meant to delay creditors. *Crane v. Mitchel*, 1 Sandf. Ch. 255; *Currie v. Hart*, 2 id. 356; *Angell v. Rosenbury*, 12 Mich. 253; *Hays v. Doane*, 11 N. J. Eq. 84. It is a fraud upon the rights of creditors to assign to a known insolvent. *Connah v. Sedgwick*, 1 Barb. 214; *Reed v. Emery*, 8 Paige, 418.

Lemuel Clute and *Blanchard & Bell*, for defendant in error.

MARSTON, J. It must be considered as settled by the clear and undoubted weight of authority, that an insolvent corporation has the right to make a general assignment of its property for the benefit of its creditors, unless prohibited by its charter or a statute of the State, nor can such an assignment be held void in this State, because opposed to the policy of our statutes relating to proceedings in chancery against corporations, or providing for their voluntary dissolution. *Town v. Bank of River Raisin*, 2 Doug. 530; *Burrill on Assignments*, 602 *et seq.*

[Omitting minor objections.]

The validity of this assignment was further questioned for the reason that the assignee was a stockholder and former treasurer of

the company and resigned such position for the express purpose of becoming assignee, and the further reason that he was insolvent.

We are of opinion that neither of these grounds, nor both combined, would be sufficient to justify us in holding the assignment absolutely void. In *Pope v. Brandon*, 2 Stewart (Ala.), 401, it was held that the deed of assignment was not void because the trustee was president of the institution and executed the deed as a grantor. There is nothing incompatible in Rogers' position as a stockholder in the corporation and as an assignee for the benefit of creditors. It is his duty as assignee to proceed and dispose of the property for the benefit of the creditors. The stockholders and creditors are equally interested in having the property disposed of upon the best terms and for the largest amount of cash that can be obtained therefor; by so doing the indebtedness is extinguished or reduced to the benefit of the corporation, and perhaps may relieve the stockholders of their individual liability. Our statutes recognize the propriety of the appointment, as receiver of an insolvent corporation, of any of the directors, trustees or any other officers of the corporation. 2 Comp. L., § 6594. These objections might well be considered by the jury, and might in some cases have a decided influence upon the minds of the jurors in determining the validity and *bona fides* of the transaction. The court below entertaining this view, very properly and favorably to the defendants, submitted these questions to the jury.

It may be manifestly proper in certain cases, owing to the peculiar nature of the business carried on, that the assignment should be made to a person conversant with such business rather than to a stranger, or one unfamiliar with it; that such a person would possess advantages and be likely to make more out of the property than a stranger, or one having no knowledge of such business, would appear reasonable. Nor does it follow, necessarily, that a person who is insolvent would thereby be legally disqualified from accepting the position of assignee; that fact might in no way affect his honesty, business qualifications or eminent fitness in all other respects for the position. As already said such facts were proper for consideration by the jury, but they would not *per se* render the assignment void.

It is also alleged as error that the court permitted evidence of the good motives of the directors in making the assignment to be proven. Corporations act by and through officers, and it would seem clear that creditors might have shown by the directors that their motive

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and object in making the assignment was for the express purpose of delaying and defrauding the creditors of the corporation in the collection of their debts. The motive of a person in doing an act, or in omitting the performance of a duty, as an officer of a corporation, has been held admissible in this State.

A careful examination of the record fails to show that any error was committed to the prejudice of the plaintiffs in error, and the judgment must therefore be affirmed with costs.

The other justices concurred.

GRAND RAPIDS AND INDIANA RAILROAD COMPANY v. HUNTLEY.

(38 Mich. 387.)

Carrier — of passengers — responsibility for manufacturer's negligence in construction of vehicle.

If a carrier of passengers purchases his vehicles from reputable manufacturers, giving them such examination as is practicable and usual among prudent carriers using similar vehicles, he is not responsible for defects not discoverable on such examination, although they might have been discovered in the manufacturing. (*See note, p. 324.*)

ACTION for personal injuries. The opinion states the facts. The plaintiff had judgment below.

Hughes, O'Brien & Smiley and *N. A. Earle*, for plaintiff in error. A railway company is not responsible for defects in machinery obtained of reliable manufacturers, and carefully examined without discovering them. *Ardesco Oil Co. v. Gilson*, 68 Penn. St. 146; *Ingalls v. Bills*, 9 Metc. 1; *Ill. Cen. R. R. v. Phillips*, 49 Ill. 234; *Stevens v. Armstrong*, 2 Seld. 485; *Painter v. Mayor*, 46 Penn. St. 213; *Boswell v. Laird*, 8 Cal. 469.

Philip Padgham, for defendant in error.

CAMPBELL, Ch. J. Suit was brought by Mrs. Huntley for personal injuries suffered on the 5th day of November, 1874, by reason of an accident caused by a passenger car being thrown from the track and upset. The testimony showed that the mischief was caused by the

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breaking of an axle containing a large flaw, within the wheel or near its edge. Those witnesses who made any actual examination found the flaw entirely within the axle, and covered by a small thickness of sound metal. The suit was tried in April, 1877, about two years and a-half after the accident. Mrs. Huntley was injured in the shoulder, and claimed that the injury was permanent.

[Omitting other points.]

The main question, however, relates to responsibility for the condition of the axle. It was held by the court below that no diligence or care in the railroad company could exempt them from want of care in the manufacturers of the cars and axles.

This doctrine is, we think, entirely incorrect. Carriers of freight are liable whether careful or not, for any act or damage not caused by the act of God or of the public enemy. Their liability therefore does not arise from negligence or want of care. It arises from their failure to make an absolutely safe carriage and delivery, which they insure by their undertaking. The analogies of carriers of freight have nothing to do with passenger carriers. These are liable only when there has been actual negligence of themselves or their servants. If they exercise their functions in the same way with prudent railway companies generally, and furnish their road and run it in the customary manner which is generally found and believed to be safe and prudent, they do all that is incumbent upon them. *Michigan Central R. R. v. Coleman*, 28 Mich. 440; *G. R. and I. R. R. v. Judson*, 34 id. 506; *Ft. Wayne, J. and S. R. R. v. Gildersleeve*, 33 id. 133; *Michigan Central R. R. v. Dolan*, 32 id. 510. This general doctrine the court below laid down very clearly, but qualified it so as to make them absolutely responsible for the omissions or lack of skill or attention of the manufacturers from whom they made their purchases of stock, however high in standing and reputation as reliable persons.

There is no principle of law which places such manufacturers in the position of agents or servants of their customers. The law does not contemplate that railroad companies will in general make their own cars or engines, and they purchase them in the market, of persons supposed to be competent dealers, just as they buy their other articles. All that they can reasonably be expected to do is to purchase such cars and other necessities as they have reason to believe will be safe and proper, giving them such inspection as is usual and practicable as they buy them. When they make such an examina-

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tion, and discover no defects, they do all that is practicable, and it is no neglect to omit attempting what is impracticable. They have a right to assume that a dealer of good repute has also used such care as was incumbent on him, and that the articles purchased of him which seem right are right in fact. Any other rule would make them liable for what is not negligence, and put them practically on the footing of insurers. The law has never attempted to hold passenger carriers for anything which they could not avoid by their own diligence.

The case of *Richardson v. Great Eastern Railway Co.*, L. R. 1 C. P. Div. 342 (Court of Appeals), is quite in point, and establishes the doctrine as it has been fixed by the general understanding since the carrying of passengers has been the subject of legal discussion. That was a passenger case, depending on the doctrine of negligence as applied to defective trucks. The axle of a truck belonging to another company, brought on the line of the respondents to be forwarded, was broken by reason of a flaw which might have been discovered by a minute examination, but which was not discovered in fact by such an examination as was customary and reasonably practicable. It was held no negligence could be imputed for not making a more minute examination than was made. In that case the court also held that it was not within the province of a jury to lay down rules after their own opinion, which imposed duties beyond the usual practice of prudent railways. See, also, *Daniel v. Metropolitan Railway Co.*, L. R. 5 H. of L. 45, upon the right of a railway company to assume there is no negligence in others over whom they exercise no control.

The injustice and illegality of holding passenger carriers to anything like a warranty of their carriages was very fully discussed and asserted in *Readhead v. Midland Rw. Co.*, L. R. 4 Q. B. 379. The New York cases which were relied on upon the argument of the present cause were considered in the light of a large number of decisions, and disapproved, as we think, correctly. They entirely ignore the true ground of responsibility as depending on the actual negligence of the carrier. There is no such thing as implied negligence, when there is none in fact.

We think the judgment erroneous, and it must be reversed, with costs, and a new trial be granted.

The other justices concurred.

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NOTE BY THE REPORTER.—Two propositions are well established: 1. There can be no doubt that a carrier of passengers is not an insurer of the safety of his vehicles. *Meier v. Penn. R. Co.*, 64 Penn. St. 225; *S. C.* 3 Am. Rep. 581; *Ladd v. Bradford R. Co.* 119 Mass. 412; *S. C.* 20 Am. Rep. 381; *McPadden v. N. Y. C. R. R. Co.*, 44 N. Y. 478; *S. C.* 4 Am. Rep. 705; *Readhead v. Midland Ry. Co.*, L. R. 4 Q. B. 379. The case of *Alden v. N. Y. C. R. R. Co.*, 26 N. Y. 102, is denied in the two latter cases, and certainly is no longer law in that State.

2. There can also be no doubt that the general American doctrine is that a carrier of passengers by railway is bound to exercise the highest degree of care and diligence in the conduct of his business, and is responsible for the smallest negligence. *Taylor v. Grand Trunk Ry. Co.*, 48 N. H. 304; *S. C.* 2 Am. Rep. 229. He is bound to use "the utmost diligence of very cautious persons;" "the greatest possible care and diligence;" "the most perfect care of a cautious and prudent man." He is bound to provide for safe conveyance "as far as human care and foresight will go." *Christie v. Griggs*, 2 Camp. 79. He warrants that his vehicle is free from faults of construction, and road-worthy, "so far as human care and foresight can provide." *Burns v. Cork, etc., R. Co.*, 13 Irish C. L. 543. "The care and circumspection to be required is the utmost which can be exercised under all the circumstances, short of a warranty of the safety of the passengers." *Hutchinson on Carriers*, §§ 501, 508. He is bound to "extreme care." *Shearn & Red. on Neg.*, § 268.

To reconcile the two above propositions, it is necessary to hold that the carrier of passengers by railway is responsible for a latent defect in the vehicle, which the manufacturer might have discovered by the application of known tests, although not discoverable upon such examinations as are practicable by the carriers. *Ingalls v. Bills*, 9 Metc. 1; *Hegeman v. Railroad*, 13 N. Y. 9; *Francis v. Cockrell*, L. R. 5 Q. B. 184; *Burns v. Cork, etc., R. Co.*, 13 Ir. C. L. 543; *Grote v. Ry. Co.*, 2 Ex. 251; *Pyne v. Ry. Co.*, 2 F. & F. 619; *McGuire v. Golden Gate*, 1 McAll. 104; *Pittsburgh, etc., R. Co. v. Nelson*, 51 Ind. 150; *Illinois Cent. R. R. Co. v. Phillips*, 49 Ill. 234. "Notwithstanding what may be said in some of the cases, the better opinion and the decided weight of authority is in favor of the position, that so far as the passenger is concerned, the carrier is responsible for the negligence of the manufacturer." *Hutchinson on Carriers*, § 512. This doctrine does not "put the carrier practically on the footing of an insurer" of the safety of his vehicle, as is intimated in the principal case, but simply makes him an insurer that the manufacturer has not been negligent. "In the ordinary course of things the passenger does not know whether the carrier has himself manufactured his means of conveyance or has employed some one else for its manufacture. If the carrier has contracted with some one else, the passenger does not usually know who that person is, and in no case has he any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge and over which he can have no control; while the carrier can introduce what stipulations and take what securities he may think proper. For the injury resulting to the carrier himself by the manufacturer's want of care, the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising from a mere breach of contract with the carrier. *Longmaid v. Holliday*, 6 Ex. 761. Unless, therefore, the presumed intention of the parties be that the passenger should, in the event of his being injured by the breach of the manufacturer's contract, of which he has no knowledge, be without remedy, the only way in which effect can be given to a different intention is by supposing that the carrier is to be responsible to the passenger, and to look for his indemnity to the person whom he selected and whose breach of contract has caused the mischief." *Francis v. Cockrell*, L. R. 5 Q. B. 184.

So far as we know, the contrary doctrine is asserted only in the Michigan and Tennessee cases, and in the *Richardson, English*, case cited in the principal case.

Nashville, etc., R. Co. v. Jones, 9 Helsk. 27, was the case of an injury to an employe. The court, however, said that they could see no distinction between that and the case of a passenger, disapproved the *Hegeman* case, and overruled *Nashville, etc., R. Co. v. Elliott*, 1 Cold. 616. They said: "The legitimate obligation imposed upon the company by its contract with a passenger or employe is, that its engine and apparatus are then suitable, sufficient, and as safe as care and skill can make them, and that the company will be responsible for any injury resulting from defects therein, which might have been discovered by the company or its agents, by the proper care and skill in the application of the ordinary and approved tests. If the defects are such that they could not be discovered by the company or agents after a careful and skillful application of

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the ordinary and approved tests, then the company cannot be held responsible, although it may appear that the defects might have been discovered by the manufacturers, by applying the proper tests. We hold it unreasonable to assume that the company not only contracts to be responsible for its own negligence, but also for that of the manufacturers." The court are unquestionably in error in saying that the *Hegeman* case is generally denied in the American States. It is only the *Alden* case that is so denied.

The *Richardson* case denied the authority of the *Hegeman* case.

Our second proposition is denied by the Michigan cases cited in the principal case. Thus, in *Michigan Cmn. R. Co. v. Coleman*, 28 Mich. 440, it was held that a charge to the jury, that carriers of passengers are "legally bound to exert the utmost care and skill in conveying their passengers and are responsible for the slightest negligence or want of skillfulness either in themselves or their servants;" that they are "bound to the utmost care and skill in the performance of their duty;" that the degree of responsibility to which they are subjected is "not ordinary care which will make them liable for ordinary neglect, but extraordinary care which renders them liable for slight neglect," etc., is too exacting in its requirements. Railroads are only held to the duty of being prudent railroad companies and to the diligence embraced by the common rules of good railroad management.

The accident in question was caused by the passenger attempting to board the train from the side opposite to the platform, and the exact holding was that the company were not bound to have platforms on both sides. "The law cannot require business to be conducted upon any unusual basis," said the court. "Everyone has a right to expect that railroads will be managed according to the common custom, and railroad companies have a right in their turn to expect conformity to this." After quoting the language of the charge, the court continued: "The language used would fairly permit the jury to find any thing to be negligence which could by any possibility be avoided. But negligence is neither more nor less than a failure of duty. All railroad companies are held to the duty of being prudent railroad companies, and bound to conduct their business with such precautions as prudence has usually found necessary. As compared with the care needed in business involving no possible human risk, the care to be used may be properly enough called extraordinary, but as compared with each other all such companies have the same duty. They would be of no sort of service to the community unless run with regularity and promptness. The delay of a train is at all times likely to derange the business and imperil the safety of others. The officers of every train are as much bound to look to their running time, for the safety of other trains, as for the convenience of those who may be on board their own. Each train must be moved by one responsible authority, and the course of business must be such as to enable this authority to be safely exercised. Any instruction which leaves out of sight the fact that railroads must be conformed to system, and cannot be likened to those means of transit in which the business of a single vehicle cannot endanger any other, or which compels a departure from the common rules of good railroad management, is directly calculated to mislead." The other Michigan cases cited are cases of master and servant, and are not particularly in point.

Mr. Schouler, although vague, seems to lean to the English doctrine. Thus, he says: "The passenger carrier is bound to have all means and appliances reasonably suitable to the transportation." He says there is no undertaking that the vehicle shall be free from defects "such as the utmost skill, care and foresight could not have detected," and that the obligation is to provide "with all the skill, diligence and foresight consistent with the nature and extent of the business." "He cannot be blamed for an injury caused, without actual fault, by the breaking of an axle through some latent defect; nor where a switch breaks through some defect that the most careful inspection would not have detected." But Mr. Schouler does not commit himself on the exact question, in the principal case, of a defect in manufacture discoverable by the use of care on the part of the manufacturer.

In a recent notice of 38th Michigan Reports, our excellent contemporary, the *Southern Law Review*, says of the principal case (vol. 6, p. 537): "The case * * * is calculated to arrest the attention. It denies two well-settled rules of American law relating to the responsibility of carriers for injuries to passengers. The first is, that the breaking down of the carrier's vehicle, or the giving way of his road, is *prima facie* evidence of negligence; the other is, that a carrier of passengers is bound to more than ordinary care. On the last point the court cites three modern English cases and some previous cases in Michigan. It is sufficient to say that the law, as

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laid down by Lord MANSFIELD and Lord ELLENBOROUGH—and this was merely stage-coach law—was, that the carrier was bound to look out for the safety of his passengers as far as human care and foresight could go, and that the breaking down of his means of transportation was *prima facie* evidence of negligence on his part. But the modern English judges, with their pockets full of railroad shares, have diminished the carrier's liability, even where he drives his carriage by steam at six times the speed of the old stage-coach, to that of ordinary care."

We quite fully agree with this statement. Not only is the principal case entirely inconsistent with the weight of authority, but in our opinion it is entirely incompatible with sound principle. To gauge the duty of a carrier of passengers by steam railway by the practice of other railway carriers of common prudence, is to adopt a very unsafe criterion, for human experience has shown that railway companies of ordinary prudence are ordinarily very imprudent in the employment of machinery and appliances. "The customary manner which is generally found and believed to be safe and prudent," frequently proves very disastrous. It seems to us there is no escape from the reasoning in *Francis v. Cockrell. supra*. The passenger cannot look to the manufacturer; the carrier can; therefore the passenger can look to the carrier. Any other rule leaves the passenger remediless.

AGRICULTURAL INSURANCE CO. v. MONTAGUE

(38 Mich. 543.)

Insurance — by husband on wife's goods — knowledge of insurer.

A policy of insurance taken by a husband in good faith on his wife's goods is void, even though the insurer had full knowledge of the true ownership.

ACTION on insurance policy. The opinion states the case. The plaintiff had judgment below.

B. W. Huston and Hatch & Cooley, for plaintiff in error.

Timothy E. Tarsney, for defendant in error.

COOLEY, J. The action in this case was upon a policy of insurance issued to one Graves and assigned by him after a loss to Montague, the plaintiff below. The plaintiff recovered judgment and the case is before us on error.

[Omitting a minor point.]

A still more palpable error was committed on another branch of the case. A quantity of silverware was covered by the policy, which proved to belong not to the insured but to his wife. In respect to this the plaintiff claimed to recover on a showing, that when the policy was drawn, Graves disclosed to the agent the real facts. The argument was that as the company, through its agent, had knowl

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edge of all the facts, and still granted the policy, the issuing of the policy was a waiver of all objection on that score. This view was accepted by the court, and the jury was instructed accordingly. If the instruction was correct, it is manifest that any person may obtain insurance upon property without any right in it whatsoever; he has but to disclose the facts, and the policy, though only a wager policy, will be as legal as any other. But such a doctrine is at war with the fundamental principles of insurance, which require that a person shall have an insurable interest before he can insure; a policy issued when there is no such interest is void, and it is immaterial that it is taken in good faith and with full knowledge. The policy of the law does not admit of such insurance, however willing the parties may be to enter into it. The doctrine of waiver has obviously nothing to do with such a case. The agent cannot do for the company by waiver what the company is powerless by express contract to do for itself; he cannot by waiver invest the insured with an interest he does not own. There was occasion to consider this question in *Peoria M. and F. Ins. Co v. Hall*, 12 Mich. 202, and it was there held that an insurance of partnership property by one partner in his own name could not be made to embrace the interest of the other partner, notwithstanding it was written by the agent with full knowledge of the facts. The reason is the one above assigned; it is not competent to write an insurance where an insurable interest is wanting, whether the facts are known or not. The difficulty is inherent in the case, and is beyond the reach of waiver.

It is proper to say in this connection that under our statute the husband has no control whatever over his wife's property; so that the question arises here precisely as it would had the silver been owned by a stranger.

A question is made in the record concerning the proof by the plaintiff of the loss of a library which was covered by the policy but as this is not likely to be important on a new trial we pass it by.

The judgment must be reversed, with costs and a new trial ordered. The other justices concurred.

VANDERHORST v. BACON.

(38 Mich. 602.)

Execution — exemption — boarding-housekeeper — receipting

Furniture purchased to carry on the business of keeping a boarding-house is exempt from execution like other household goods, and is not within a statute subjecting to execution, on a judgment for the purchase-price, stock in trade or means of carrying on the party's occupation.

The right to exemption is not waived by the debtor's failing to claim it and receipting to the officer for the goods.

REPLEVIN. The opinion states it. The plaintiff had judgment below.

Taggart, Simonds & Fletcher, for plaintiff.

Fallass & Gleason, for defendant. Goods bought to carry on a boarding-house are liable under Comp. L., § 6101, subd. 8, to execution for the purchase-money. *Weed v. Dayton*, 40 Conn. 293. And in any event, if not claimed as exempt, they would be liable to seizure and sale. *O'Donnell v. Segar*, 25 Mich. 367. If the debtor points out his property to an officer levying execution, he cannot object to a seizure of it. *Dorsey v. Hills*, 4 La. Ann. 107. Appraisal of goods seized on execution may be made at any time before it is noticed for sale. *King v. Moore*, 10 Mich. 545.

COOLEY, J. The circuit judge, who tried this cause without a jury, found the following facts:

"First. That on or about the 22d day of December, 1875, John Vanderhorst and wife went together to the Berkey & Gay Furniture Company's warerooms to purchase some furniture with which to furnish a boarding-house.

"Second. That John Vanderhorst and his wife are Hollanders, and that John Vanderhorst speaks very broken English and understands it imperfectly; but his wife talks English much more plainly, and on this account she transacted most of the business.

"Third. That John Vanderhorst purchased, at that time, the goods in question in this suit, agreeing to pay therefor one hundred

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and forty (\$140.00) dollars, one Moses May at that time becoming surety for sixty (\$60.00) dollars of this amount, which he afterwards paid.

“Fourth. That after the expiration of the time of payment, the Berkey & Gay Furniture Company brought an action for the unpaid balance against said John Vanderhorst, before E. J. Shinkman, Esq., a justice of the peace in the city of Grand Rapids, and obtained judgment on the 10th day of July, 1876, for balance unpaid and interest: Damages \$81.63; costs, \$3.31.

“Fifth. Upon this judgment execution was issued and placed in the hands of defendant, Bacon, who was at the time, and ever since has been, a constable of Kent county.

“Sixth. By virtue of this execution the defendant took control of the property involved in this case, it being the same property bought by Vanderhorst of the Berkey & Gay Furniture Company, as above mentioned, but caused no appraisal of it to be made at that time or at any time afterwards; nor any removal of the property from Vanderhorst's house at that time because of facts hereinafter found.

“Seventh. At the time Bacon so took possession of the property, Vanderhorst's wife said to the defendant that said Moses May was absent from home and that as soon as he returned he would pay the judgment. Defendant referred her to the Berkey & Gay Furniture Company, and she and her husband went to the office of the company, and Mrs. Vanderhorst then and there, in the presence of her husband and with his knowledge and without his objection, agreed that she would execute a regular receipt for the property, which she afterwards did, as stated in the next succeeding paragraph of this finding.

“Eighth. That thereupon defendant went back to the house and obtained a receipt of said plaintiff's wife. [This receipt was the usual receipt taken by officers for property levied upon, and in it the receiptor promised to deliver the property to the officer on the fifteenth day of August following, or to pay the judgment.]

“Ninth. Upon said May's return he refused to pay for said goods, and thereupon, to wit, on the 24th day of August, 1876, defendant went and asked for the goods in question upon said execution, and Mrs. Vanderhorst pointed them all out to the defendant as agreed, and made no objection to defendant's taking them.

“Tenth. That this was in the afternoon, and defendant took possession of said goods, loaded them upon a wagon and started with

them to Berkey & Gay's warerooms for safe-keeping, but while moving them and when about one and one-quarter miles from plaintiff's house he was served with the writ in the cause.

"Eleventh. No objection was made to defendant's taking said goods or had been at any time before the commencement of this action, and no demand of the goods or for their return was made before the service of the writ, but Vanderhorst was not at his house at the time of removal of said goods.

"Twelfth. Soon after these goods were purchased by Vanderhorst he quit keeping boarding-house. The goods in question in this case were worth about the sum of one hundred and forty dollars, and constituted all the furniture owned by Vanderhorst at the time save one stove and other household furniture not exceeding in value the sum of twenty-five dollars. And that Vanderhorst was a householder at the time the levy was made and this suit commenced.

"I also further find as a matter of law that plaintiff is entitled to recover all of the goods in question, together with six cents damages and the costs of both courts."

It is objected to this conclusion:

1st. That the goods were purchased, not as household goods but to carry on a business of profit, and therefore are to be considered stock in trade, or the means of carrying on the party's occupation. If so, they are not, under the statute, exempt from an execution on a judgment for the purchase-price. Comp. L., §§ 6101, 6131. But we doubt if these articles could at any time have been considered anything else than household furniture. A boarding-housekeeper must be entitled to the same exemption of household furniture with any other person, and the finding shows that at no time did the plaintiff have more than was exempt. And when the levy was made he was not engaged in the business for which the furniture was purchased.

2d. It is said the plaintiff did not claim the property as exempt when the levy was made upon it. But this was not necessary. The statute exempts to a householder his furniture to the value of \$250. and it requires the officer, when he makes a levy, to proceed to have it appraised and set out to the debtor. Comp. L., § 6102 *et seq.* The statute is all the notification the officer needs.

3d. It is claimed that the acts of the plaintiff and his wife were equivalent to a waiver of the exemption and to a turning out of the property on the execution. We do not think so. The wife gave a

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receipt for the property to save its being taken away while she made an effort to pay the judgment; but failing in this, she yielded possession to the constable. But this was only yielding to a force which she could not resist; it was not a surrender of any right.

[Omitting an unimportant consideration.]

We are constrained to think the conclusion of the circuit judge was correct, and that as the officer was abusing his authority, no demand was necessary before bringing suit. The judgment must be affirmed, with costs.

The other justices concurred.

PEOPLE v. WRIGHT.

(38 Mich. 744.)

Criminal law — coercion of wife — presumption.

Where a wife choked a man and told him to keep still, while her husband picked his pockets, a jury was justified in finding that she was not acting under coercion, but independently.

CONVICTION of robbery. The opinion states the facts.

J. Logan Chipman, for plaintiffs in error. It is conclusively presumed that a wife, helping her husband in a crime, for his benefit and in his presence, acts under his coercion. *State v. Potter*, 42 Vt. 495.

Otto Kirchner, Attorney-General, for the people.

MARSTON, J. An information charging respondents and one William H. Prinz with robbery, was filed in the Recorder's Court of the city of Detroit.

[Omitting a minor point.]

The respondents are husband and wife, and it is insisted the court should have instructed the jury, that under the evidence the law *conclusively* presumed the wife was acting under the coercion of her husband.

Upon this subject the court charged: "In regard to Mrs. Wright. the general presumption of law is, that the wife is acting under the coercion of her husband. Of course she is not to be found guilty

ordinarily, but you have a right to consider all the circumstances, and if from all the circumstances you are satisfied she was not under the coercion of her husband, but acted voluntarily, she is as guilty as he."

The charge as given was in my opinion correct. The offense charged was robbery, a felonious taking of the property of another by force. The evidence given on the trial tended to show that in the commission of the offense, Nellie Wright, the wife, "took hold of his (Kent's) throat and told him to keep still," while her husband and Prinz put their hands in his pockets and took what money he had. Under such circumstances the jury would be justified in finding that she was not acting under the coercion of her husband, but that she was an active participant, if not the most active, in the commission of the offense charged. 1 Russ. on Crimes, 22; 3 Greenl. Ev. § 7; Roscoe's Cr. Ev. p. 911.

In my opinion the exceptions were not well taken, and the Recorder's Court should be advised to proceed to judgment.

The other justices concurred.

McEWAN v. ZIMMER.

(88 Mich. 765.)

Judgment — action on foreign — jurisdiction

A judgment of a Canadian court on personal service of process in Michigan, where the defendant did not appear or recognize the jurisdiction, will not support an action in Michigan, although the laws of Canada provide for such a service.

ACTION on a judgment. The opinion states the facts. The defendant had judgment below.

Ed. E. Kane, for plaintiff in error. International comity binds courts in the United States to recognize and enforce the judgments of the Canadian courts. *Kennedy v. Earl*, 2 Swanst. 326; *Boucher v. Rawson*, Cases Temp., Hardw. 89; *Roach v. Garvan*, 1 Ves. Sr. 157; *Henderson v. Henderson*, 6 Q. B. 288; *Ferguson v. Mahon*, 11 Ad. & Ell. 179; *Scott v. Pilkington*, 2 B. & S. 11, 41; *Imrie v. Castrique*, 8 C. B. (N. S.) 405; Story's Conf. Laws, §§ 603, 608; 1 Kent's Com. 121; *Cummings v. Banks*, 2 Barb. 605; *Monroe v.*

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Douglas, 4 Sandf. Ch. 181; *Bank v. Harding*, 5 Ohio, 545; *Rankin v. Goddard*, 54 Me. 88; 55 id. 391; *Messeir v. Amery*, 1 Yeates (Pa.), 541; 1 Am. Dec. 316; *Rapelje v. Emery*, 2 Dal. 233; *Barrow v. West*, 23 Pick. 272; *Lazier v. Westcott*, 26 N. Y. 150. A foreign judgment is *prima facie* evidence of indebtedness under the common counts. 3 Com. Dig., Debt (A 2); *Bartlett v. Knight*, 1 Mass. 105; 2 Am. Dec. 86; *Phillips v. Hunter*, 2 H. Bl. 410; *Galbraith v. Neville*, 5 East, 475, note; *Hall v. Odber*, 11 id. 123; *Taylor v. Brylen*, 8 Johns. 178; *Pauling v. Bird's Exors.*, 13 id. 206.

Prentiss & Fox, for defendants in error.

COOLEY, J. This was an action upon a judgment purporting to have been rendered by the County Court of county Essex, in the province of Ontario, Dominion of Canada, in favor of McEwan against Zimmer. The only question which the record presents is one of jurisdiction in the County Court of Essex to render the judgment, and this arises upon the service which was made on the defendant. Zimmer, it appears, was proceeded against as a non-resident under certain provisions of the statutes known as the Consolidated Statutes of Upper Canada, of which the sections which bear upon the case are the following:

"43. In case any defendant, being a British subject, is residing out of Upper Canada, the plaintiff may issue a writ of summons in the form (A) No. 3, which writ shall bear the indorsement contained in the said form, purporting that such writ is for service out of Upper Canada, and the time for appearance by the defendant shall be regulated by the distance from Upper Canada of the place where the defendant is residing, having due regard to the means of, and the necessary time for, postal or other communication. (19 V., ch. 43, § 35.)

"44. Upon the court or judge being satisfied that there is a cause of action which arose in Upper Canada, or in respect of the breach of a contract made therein, and that the writ has been personally served upon the defendant, or that reasonable efforts have been made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant willfully neglects to appear to such writ, or that he is living out of Upper Canada, in order to defeat or delay his creditors, such court or judge may, from time to time, direct that the plaintiff shall be at liberty to proceed in the action in such manner, and subject to such con-

ditions as to such court or judge (having regard to the time allowed to the defendant to appear being reasonable, and to the other circumstances of the case) may seem fit; but the plaintiff, before obtaining judgment, shall prove the amount of the debt or damages claimed by him in such action, either before a jury on an assessment in the usual mode, or by reference in the manner hereinafter provided, according to the nature of the case, as such court or judge may direct. (19 V., ch. 43, § 35.)

“45. In any action against a person residing out of Upper Canada and not being a British subject, the like proceedings may be taken as against a British subject resident out of Upper Canada, except that the plaintiff shall, instead of the summons mentioned in the forty-third section, issue a writ of summons according to the form (A) No. 4, and shall, in manner aforesaid, serve a notice of such last-mentioned writ upon the defendant, which notice shall be in the form also contained in the said form No. 4; and such service or reasonable efforts to effect the same, shall be of the same force and effect as the service or reasonable efforts to effect the service of a writ of summons in any action against a British subject resident abroad, and by leave of the court or a judge, upon their or his being satisfied by affidavit as aforesaid, the like proceedings may be had and taken thereupon.” (19 V., ch. 43, § 36.)

Zimmer, it was conceded, was not a British subject, and the record of the judgment in the County Court shows that the only service made upon him was made at the city of Detroit in this State. It also shows that he did not in any manner respond to the service, and that judgment was taken against him by default. No property appears to have been attached in the province, and no jurisdiction to render the judgment is claimed unless the service in Detroit conferred it. The only question the record presents may therefore be stated as follows: Whether it is competent for a foreign court to make service of its process in this State, and on the authority of such service to proceed to judgment against a party who refuses to recognize the jurisdiction?

We had not supposed, until this suit was brought to our attention, that such a jurisdiction could seriously be contended for. The rule laid down by Judge STORY, in his Conflict of Laws, has been supposed to be of universal acceptance, that “no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority

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of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." *Confl. of Laws*, § 539. Mr. Wharton repeats this rule as one not questioned. *Confl. of Laws*, § 712. And it is believed to have been recognized in every case arising in the courts of this country in which the exact point has been presented. If any case is an exception, it has escaped our attention.

It is urged, however, that the rule in Great Britain and the British provinces is otherwise, and that comity requires that we recognize and accept the rule of jurisdiction that prevails where the judgment was rendered. The obligations of international comity, we trust, will never be questioned in this State, especially when they are invoked in behalf of our neighbors of the Dominion, with whom our relations are so intimate, and it may be added, so friendly and cordial. We should certainly never have the assurance to demand from them more than we would freely and voluntarily concede to them. True comity is equality; we should demand nothing more and concede nothing less.

The English decisions having direct bearing on the question are not very numerous. *Douglas v. Forrest*, 4 Bing. 686, was an action in England upon a Scotch judgment, obtained without personal service, and after notice to the defendant by the process called "horning," which may or may not have ever come to his knowledge. The validity of the judgment was recognized, and the action sustained. But an inspection of the case and a reading of the opinion of Chief Justice BEST will disclose the fact that the rule as laid down by Mr. Justice STORY in his treatise on the Conflict of Laws is in no manner assailed or questioned. The defendant was executor of a Scotch estate, and it was in that capacity that he was sued; and the jurisdiction was supported on the express ground that the estate was within the jurisdiction of the Scotch court, and that the defendant himself owed allegiance to that country. "To be sure," says the chief justice, "if attachments issued against persons who never were within the jurisdiction of the court issuing them, could be supported and enforced in the country in which the person attached resided, the legislature of any country might authorize their courts to decide on the rights of parties who owed no allegiance to the government of such country, and were under no obligation to attend its courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judg

ment was so given against him, from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it."

In *Becquet v. MacCarthy*, 2 B. & Ad. 951, the judgment in question was rendered in one of the British colonies, and by the law of the colony if the defendant was absent and could not be personally served, the service was permitted to be made on the King's attorney-general for the colony. It was so made in that case — the defendant, who was an official lately domiciled in the colony, being then absent. The substituted service was sustained as sufficient. It was made within the jurisdiction of the court, and the case is therefore not analogous to the present, and we have no occasion either to approve or question it. Our laws provide in some cases for a substitute for personal service, where the party is within the jurisdiction or only temporarily absent; and where the substitute is such as with reasonable certainty will bring the proceeding to the knowledge of the respondent, it is perhaps competent to give to such service the full effect of that made upon a person. But no such question is now before us.

In *Bank of Australasia v. Nias*, 16 Q. B. 717, the defendant, who was a stockholder in a joint-stock company in New South Wales, was sued in England on a liability as such stockholder which it was claimed was established by a judgment against the chairman of the company in New South Wales, under a statute which permitted the chairman to be sued as representative of the company. The statute was sustained and the action was supported. Lord CAMPBELL in his opinion declares that the statute was passed for the benefit of the company, and that there was nothing at all repugnant to the law of England, or to the principles of natural justice, in enacting that actions upon contracts made by the company, instead of being brought individually against all the stockholders, should be brought against the chairman whom they had appointed to represent them. The case is treated as one in which the parties, by accepting the benefits of a statute, had consented to certain forms of procedure for which it provided.

A case more important to the present discussion is that of *Schibsby v. Westenholz*, L. R. 6 Q. B. 155. The action in that case was upon a French judgment, obtained without personal service of process, under a statute not differing essentially from the statute of

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Upper Canada which is supposed to sustain the judgment now in question. The only difference of moment between that case and the present is, that there the contract on which the French court gave judgment was an English contract, while in this case the judgment was given for services performed by the plaintiff in Canada, and possibly it may be claimed that the implied contract to pay for these services was a Canada contract, though the defendant was not in Canada at the time. Whether this difference has any legal significance will be considered further on. Putting this circumstance aside, the two cases are strictly analogous, and it is fortunate that in passing upon the force that should be given to a Canadian judgment under the circumstances we are afforded the light of a decision by one of the courts at Westminster on the very point in dispute.

It should be stated here that the statute of Upper Canada was a substantial reproduction in that province of the provisions of the English common-law procedure act (1852), which in terms permit judgment to be taken against persons out of the realm on a service of process made abroad. The case was therefore one in which it might be urged with great force, that comity required that the courts in England should recognize the validity of judgments obtained in France, upon a service precisely analogous to that which the English statute made sufficient to support a judgment in that country. BLACKBURN, J., in delivering the opinion of the court, declared as the true principle on which the judgments of foreign tribunals are enforced in England, that stated by PARKE, B., in *Russell v. Smyth*, 9 M. & W. 819, and repeated in *Williams v. Jones*, 13 id. 633, that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts of England are bound to enforce, and that consequently anything which negatives that duty, or forms a legal excuse for not performing it, is a defense to the action, and proceeded to say: "We were much pressed on the argument with the fact that the British legislature has, by the common-law procedure act (1852) conferred on our courts a power of summoning foreigners, under certain circumstances, to appear, and in case they do not, giving judgment against them by default. It was this consideration principally which induced me at the trial to entertain the opinion which I then expressed and have since changed. And we think that if the principle on which foreign judgments were enforced was that which is loosely called 'comity,' we could hardly

decline to enforce a foreign judgment given in France against a resident in Great Britain under circumstances hardly, if at all, distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France; but it is quite different if the principle be that which we have just laid down. Should a foreigner be sued under the provisions of the statute referred to, and then come to the courts of this country and desire to be discharged, the only question which our courts could entertain would be whether the acts of the British legislature, rightly construed, gave us jurisdiction over this foreigner; for we must obey them. But if, judgment being given against him in our courts, an action were brought upon it in the courts of the United States (where the law as to the enforcing foreign judgments is the same as our own), a further question would be open, viz., not only whether the British legislature had given the English courts jurisdiction over the defendant, but whether he was under any obligation which the American courts could recognize to submit to the jurisdiction thus created." And further on he says that the real question which the court of the United States must pass upon in the supposed case would be this: Can the island of Great Britain pass a law to bind the whole world?—a question which he ventures to answer without hesitation in the negative.

But for a single remark in this opinion by Mr. Justice BLACKBURN it should, as it seems to us, be accepted on all sides as covering completely the present case. The remark referred to is in the nature of a suggestion, that if at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, perhaps the laws of the foreign country ought to bind them. The remark was not relevant to any facts then before the court, nor in our opinion, does the present case require us to consider how far the suggestion has force. This defendant was not in Canada when the demand accrued, and in no manner has he submitted himself to its laws unless he can be said to have done so in employing the services of the plaintiff in that country. If we might assume, which we cannot under the circumstances, that the supposed contract was a Canada contract, it is not by any means clear to our minds that the fact should affect the decision. If the obligation on the courts of one country to enforce the judgments of another be grounded in comity, it ought to appear that under corresponding circumstances it would be expected in this State that the courts of Canada would enforce a judgment given in Michigan on a Michigan

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contract, against a resident in Canada who was never served with process except in the Dominion. So far is it from being the fact that such an expectation would exist, that the courts of this State are not permitted by virtue of any statute, or of any principles supposed to be derived from the common law, to render any such judgment; and should it by inadvertence or by mistake of law be entered up by any court of this State, any other court, and indeed the party defendant himself, might treat it, so far as it assumed to establish a personal demand against him, as an absolute nullity. No better illustration of the views held by our own courts upon this subject can be instanced than the case of foreclosure suits in equity against non-resident mortgagors, where, although the case may proceed to decree on notice made by publication or personally served in a foreign jurisdiction, yet the notice is never accepted as the full substitute for service of process within the State, and though the case goes to a decree for the sale of the land, a personal decree against the party liable for the mortgage debt is never permitted to be taken upon such notice. *Lawrence v. Fellows*, Walk. Ch. 468; *Outhwaite v. Porter*, 13 Mich. 533; *Tyler v. Peatt*, 30 id. 63. We may then dismiss comity from consideration as constituting any basis for the enforcement of the judgment now before us. We should certainly, *mutatis mutandis*, not expect it to be enforced. And we may add that in the still more pointed case of the attachment of lands of a non-resident as the commencement of a suit to collect a debt, though the statute provides for the case proceeding to judgment against the defendant on proof of the statutory notice by publication, yet the judgment is not regarded as establishing a personal demand against the defendant, and we should neither expect it to be enforced as such abroad nor enforce it ourselves. This is so well understood in this State that the point is never mooted.

On the other hand, if the obligation to enforce a foreign judgment is to be rested on the duty or obligation of the defendant to pay the sum for which the judgment was given, as Mr. Baron PARKE and Mr. Justice BLACKBURN suppose, then it is important to know from what such duty or obligation springs. It is certain that it cannot spring from the mere fact that some court has assumed to render a judgment, but the proceedings anterior to the judgment must have been such as fairly imposed upon the party sued the obligation to appear and make his defense to the demand set up, if any he had; and if, under the circumstances, he was fairly entitled to treat any

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notice of the suit which may have been given him as unwarranted, and to disregard it, then it seems plain that no obligation to recognize the conclusions of the court in the suit could possibly arise. The question then seems to be narrowed to this, whether the service of process beyond the jurisdiction of the court issuing it can impose upon the party served the obligation to appear in the suit and make there his defense, if he has any? If this question must be answered in the affirmative as regards a judgment rendered in Canada, it must receive a like answer when it contemplates a judgment rendered on a like service in New Zealand, or in one of the colonial courts of the Dutch East Indies. The question therefore is not one to be disposed of on a consideration merely of how this defendant might be affected, but it suggests the possible cases of citizens of this country proceeded against in the remotest borders of civilization on claims which may or may not have a foundation in justice, but which become established claims by default in making answer to a suit upon them.

Now the service of process is for the purpose of notifying the defendant and giving him a fair opportunity to defend. But the service of process in Michigan, which requires one to appear and answer to a demand in a foreign country, would in general be of no value whatever, because a defense abroad would either be practically impossible or would be so expensive as to exceed in cost the importance of the demand. It may therefore justly and emphatically be declared that such service would give no fair opportunity to defend, and consequently could not accomplish the purpose of process. Were the doctrine accepted which would permit it, it might reasonably be anticipated that fictitious claims would be asserted abroad against Americans, who, for business or pleasure, had visited foreign countries, and would become established claims by default in a defense which a party wrongfully charged could not afford to make. We think the doctrine has no foundation in reason or in the principles of international law or international comity.

We refer, as supporting these general views, to *Bischoff v. Withered*, 9 Wall. 812, and *Wood v. Parsons*, 27 Mich. 159; also to *People v. Dawell*, 25 Mich. 247; *S. C.*, 12 Am. Rep. 260, where the general subject received some attention.

We find no error in the judgment and it must be affirmed, with costs.

The other justices concurred.

CASES
IN THE
SUPREME COURT
OF
MINNESOTA.

FIRST NATIONAL BANK OF ROCHESTER v. PINNISON.

(34 Minn. 140.)

National bank — power to deal in promissory notes.

A national bank has no power to deal or speculate in promissory notes, or to acquire title thereto, except by discount.*

ACTION by a national bank upon a promissory note. The opinion states the facts. The defendant had judgment.

Jones & Gove, for appellant.

Chas. C. Willson, for respondent.

CORNELL, J. It is expressly found as a fact by the district court, before whom this cause was tried without a jury, "that the transaction under which the plaintiff claimed to have acquired the note in question was a purchase, and not a discount, or lending of money on the credit of it;" and we have no hesitation in saying, that upon the evidence, we fully concur with the court that such was undoubtedly the real nature of the transaction as intended by the parties thereto. As a conclusion of law from this finding the court held "that the plaintiff, a national bank corporation, had no authority to purchase or traffic in promissory notes as choses in action, and did

* See *National Pemberton Bank v. Porter* (125 Mass. 333), 28 Am. Rep. 235.

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not in law acquire, by the supposed purchase, any title to the note in question, and cannot recover upon it in this action."

Upon the fact, as thus found, it will be seen that the only question presented is whether a national bank, created and organized under the act of congress "to provide a national currency," etc., is authorized to deal or traffic in promissory notes as a species of personal property, or to acquire any title to such paper by a purchase made admittedly not in the way of discount, or by lending money on the credit of it.

In the case of the *Farmers and Mechanics' Bank v. Baldwin*,²³ Minn. 198 ; 23 Am. Rep. 683 ; it was expressly held that no power of this character is conferred by a law of this State, which authorizes State banks, organized under its provisions, "to carry on the business of banking by discounting bills, notes and other evidences of debt, by receiving deposits, by buying and selling gold and silver bullion, foreign coin, and foreign and inland bills of exchange, by loaning money on real and personal securities, and by exercising such incidental powers as may be necessary to carry on such business," and that a purchase of such paper, made not in the way of discount, was *ultra vires*, as outside the legitimate scope and purposes of such institutions.

Under the congressional enactment the authority which is given is "to exercise all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of said title." U. S. Rev. St. § 5136.

This is substantially like the State statute which was under consideration in the *Farmers and Mechanics' Bank v. Baldwin*, *supra*. The word "negotiating," as used in this section, and likewise in section 29 of the same statute, is used in its ordinary and appropriate transitive sense to indicate, not an act of purchase, but one of transfer, whereby the negotiated paper is passed from the holder or owner and put into circulation. Hence the incidental power to negotiate notes to the extent necessary to carry on the business of banking, simply implies an authority to realize upon such commercial paper as the bank may receive in the lawful conduct of its business, by negotiating, selling and transferring it by means of a rediscount obtained, or otherwise. It gives no implied authority to speculate or traffic in paper of the character of the note in question, or in

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financial securities of any description. *Morse on Banking*, 4 and 5. The powers, therefore, which are conferred by this section, in respect to the acquisition of commercial or business paper, are in no way affected or enlarged by the use of the term "negotiating." In the absence of any authoritative exposition of the federal statute in this regard, the principle settled in the *Farmers and Mechanics' Bank v. Baldwin* must be regarded as decisive of the present case.

It is suggested by counsel for appellant that upon the evidence this case is distinguishable from that of the *Farmers and Mechanics' Bank v. Baldwin*, in that the note sued on here was indorsed by Butler, the holder, at the time of the transfer to the plaintiff. This fact is undoubtedly a distinguishing though not conclusive test of the character of the transaction, and ordinarily raises a strong presumption denoting the existence of the relation of lender and borrower between the bank and the party so making the transfer, and thereby indicates that the parties really intended a loan of money upon the credit of the paper so indorsed; and we have no doubt, when such is the intention, "a borrower may," as was held in *Smith v. Exchange Bank of Pittsburgh*, 26 Ohio St. 141; *Thomp. Nat. Bk. Cas.* 836, cited by appellant, "obtain the discount by a bank of the existing notes and bills of others, of which he is the holder, as well as of his own paper made directly to the bank," and that the bank will thereby acquire a valid title to such paper, because it makes the purchase by discount, or through the exercise of its discounting powers. But where the acts of the parties and the circumstances surrounding the transaction clearly rebut any presumption arising from the indorsement, and indisputably indicate the real nature of the transaction intended by the parties to be, in the language of the court below, "an out-and-out purchase of the note, and not discounting it or lending money on the credit of it," the mere fact of indorsement is not sufficient to warrant the court in treating the transaction as something different from what was intended.

We fully concur with the court below in its conclusion as to the character of the transaction in this case. It was an ordinary case of note-shaving, pure and simple, for the purposes of gain alone, outside the circle of any legitimate banking business, and foreign to any purpose for which those institutions are established. No loan was made or intended, nor was there any discount, in the ordinary and legal acceptation of that term, as applied to the business of banking.

Judgment affirmed.

STATE V. COOKE.

(24 Minn. 267.)

Constitutional law — local option as to license of intoxicating liquors.

A statute authorizing the legal voters of a city to determine whether licenses for the sale of intoxicating liquors should be granted, and providing that if such voters should determine against such licensing, the sale of such liquors thereafter should be a misdemeanor, and punishable as therein provided, is valid;* and such a determination would revoke all outstanding licenses.

CONVICTION of selling intoxicating liquors without license, on May 10, 1876, in Rochester. The defendant justified under a license granted December 1, 1876, for one year. On April 3, 1877, the voters of Rochester had determined not to grant such licenses. The opinion states the other facts.

Chas. C. Willson and C. M. Start, for appellant. The general scope and object of the statute was the regulation of the subject of new licenses, and section 3 ought not to be extended in its application so as to embrace old licenses. *Attorney-General v. Detroit*, 2 Mich. 139; *Estate of Ticknor*, 13 id. 44; *Bank v. Hale*, 59 N. Y. 53; *Bryant v. Livermore*, 20 Minn. 313; *Grimes v. Bryne*, 2 id. 92. The law is unconstitutional, as an attempt to delegate the law-making power to the people of the city of Rochester, not as a municipal body, but as individual electors. The vitality of the law depends upon the vote of the people, and not upon the judgment of the legislature. *Ex parte Wall*, 48 Cal. 279; *S. C.*, 17 Am. Rep. 425; *State v. Weir*, 33 Iowa, 134; *Geebrick v. State*, 5 id. 493; *Barto v. Himrod*, 8 N. Y. 483; *Maize v. State*, 4 Ind. 342; *Meshmeier v. State*, 11 id. 484; *Rice v. Foster*, 2 W. & S. 58.

R. H. Gove, city attorney, and *H. C. Butler*, county attorney, and *George P. Wilson*, Attorney-General, for respondent.

GILFILLAN, Ch. J. The charter of the city of Rochester, as amended in 1867, provided (Sp. Laws 1867, p. 135, § 1) that the common council might "grant licenses for vending or dealing in spirit-

* To same effect, *Commonwealth v. Weller* (14 Bush, 218), 29 Am. Rep. 407.

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uous, vinous, or fermented liquors," and might "restrain and prohibit any person from vending, giving or dealing in spirituous, vinous, fermented, mixed or intoxicating liquors of any kind, and impose such restrictions or prohibitions by fine or imprisonment." To the police power thus vested in the council no valid objection can be made. Under it the council might determine that no person should be permitted to deal in liquors, and impose and enforce penalties for doing so. We can see no reason to doubt that it was competent for the legislature to have given the prohibitory power to the council, and in the charter itself have prescribed the penalty for disregarding such prohibition, providing in such case for the contingency of a prohibition by the council; and a disobedience of such prohibition would not subject that part of the charter to the objection that it became law only upon the action of the council. In such case it would be the law, upon the passage of the act, that if the council should prohibit the traffic in liquors, any one violating such prohibition should be liable to the penalty.

The charter was, in 1876, amended (Sp. Laws 1876, ch. 34, § 1) by an act, the first section of which reads: "The legal voters of the city of Rochester are hereby authorized to vote upon and determine for themselves the question whether license for the sale of intoxicating liquors shall be granted in said city or not." The second section provides for the vote of the electors upon the question, and that if a majority of the voters shall be against license, no license for the sale of liquors in the city shall be granted. The third section provides that if it be determined, as therein provided, that no license shall be granted, then "any person thereafter who shall sell, bargain or dispose of any spirituous, malt, vinous, fermented or intoxicating liquors, within the corporate limits of said city, shall be deemed guilty of a misdemeanor," and shall, upon conviction, be punished as prescribed in the section.

The effect of the act is to make the vote of a majority of the voters against license a prohibition, from and after the time it is taken, against the sale of liquors. The power to make such prohibition is taken from the council and vested in the electors. When the legislature confers any power upon a municipal corporation, it may prescribe by whom the power shall be exercised, by a particular officer or set of officers, or by the electors at large; and the removal of the power in question from the council to the legal voters was unquestionably valid.

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The imposition by the amendatory act of the penalty for disregarding a prohibition by the vote of the electors, stands upon the same footing as would the imposition by the original charter of a penalty for violating a similar prohibition by the council. The part of section 3 of the act of 1876, which we have quoted, clearly makes it unlawful for *any person*, without any exception of those having unexpired licenses, to sell, bargain or dispose of liquors after the voters shall determine that no license shall be granted. This provides for an effectual revocation of outstanding licenses by the vote of the electors. Although penal statutes should be construed strictly, they cannot be construed contrary to the language used; and to construe this act so as to exclude from its operation those having licenses unexpired, when the language used is that "any person thereafter (that is after the vote) who shall sell," etc., "shall be guilty of a misdemeanor," would be contrary to the plain import of the language.

Judgment affirmed.

LOY V. HOME INSURANCE COMPANY.

(34 Minn. 315.)

Insurance — change of title by legal process or judicial decrees — foreclosure by advertisement.

A policy of insurance on a house provided that if the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, the policy should be void. A mortgage of the premises subsequently executed was foreclosed and a sale was had, but the period for redemption had not expired nor had possession been changed. A loss subsequently occurring, *held*, that neither the giving of the mortgage nor the foreclosure proceedings avoided the policy.*

ACTION on a policy of fire insurance. The opinion states the facts. The plaintiff had judgment below.

Henry C. Butler, for appellant. The words "any change" meant a partial as well as entire change, and the word "transfer" a partial

* To same effect, *Hartford Fire Ins. Co. v. Walsh* (54 Ill. 164), 5 Am. Rep. 115; *Manhattan F. I. Co. v. Wells* (28 Gratt. 389), 26 Am. Rep. 244.

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as well as entire transfer. Under the statutes a mortgage was deemed a conveyance for every purpose save that it did not confer the right of possession without a foreclosure. Gen. St., ch. 40, § 26; id., ch. 75, § 11; *Plath v. M. F. M. F. Ins. Co.*, 23 Minn. 479; *S. C.*, 23 Am. Rep. 697; *Langdon v. M. F. M. F. Ins. Co.*, 22 Minn. 194; and by the term "legal process" the parties intended any proceeding authorized or provided by law as distinguished from a voluntary conveyance.

Start & Gove and *P. M. Tolbert*, for respondent.

CORNELL, J. The policy on which this action is brought contains the following among other conditions:

"If the property be sold or transferred or any change takes place in title or possession (except by reason of the death of the insured), whether by legal process or judicial decree, or voluntary transfer or conveyance, * * * this policy shall be void."

The property insured consisted of a dwelling-house and certain furniture and wearing apparel therein contained situate upon premises belonging to the respondent. After the issuance of the policy the respondent mortgaged the premises, and the same were sold under a power of sale upon a foreclosure of the mortgage by advertisement pursuant to the statute. After the sale and before the period for redemption had expired, the loss occurred, the respondent still being in possession of the premises.

The question for consideration is whether this foreclosure sale was "a sale, transfer or change in title" within the meaning of the foregoing condition, such as avoided the policy.

In construing a condition of this character, if, upon a consideration of the whole contract, it is uncertain whether the language of the stipulation is used in an enlarged or restricted sense, or if it is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured to the indemnity which it was his object in making the insurance to obtain, that should be adopted which is most favorable to the insured, and most in harmony with such, the main purpose of the contract on his part. The reasons for this are two-fold; the tendency of any such stipulation is to narrow the range and limit the force of the underwriter's principal obligation. It is also inserted by him for his own benefit and in language of his own choice. If any doubt arises as to its meaning the fault is

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his in not making use of more definite terms in which to express it; hence, the rule of strict construction against him, and the liberal one in favor of the assured, which prevail under such circumstances. *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Westfall v. Hudson Riv. Ins. Co.*, 2 Duer, 495; *Ins Co. v. Wright*, 1 Wall. 456; *West Ins. Co. v. Cropper*, 32 Penn. St. 351.

Applying these principles, a correct interpretation of this condition of the policy would seem to be attended with but little difficulty. In the first place it makes a sale or transfer of the property a cause for avoiding the policy. Within the meaning of the stipulation this refers to an absolute and completed and not a conditional or incomplete sale or transfer; in other words, a sale that wholly divests the owner of the property of all insurable interest therein.

The succeeding clause which gives a like effect to any "change in title, * * * whether by legal process, judicial decree or voluntary transfer or conveyance," has reference to an absolute transfer of the legal title in one of these ways, though such transfer, as in the case of a conveyance in trust or by a deed absolute in terms, but intended merely as a security, might not operate to divest the owner of the property of all his insurable interest therein.

In our judgment nothing short of a complete transfer of the legal title comes within the prohibition of this stipulation. The mere creation of a lien or incumbrance upon the property insured cannot be regarded as effecting "any change in title," either in the legal sense or according to the ordinary and popular understanding. "In legal acceptance," says ALLEN, J., in *Springfield F. and M. Ins. Co. v. Allen*, 43 N. Y. 389; *S. C.*, 3 Am. Rep. 711, "title has respect to that which is the subject of ownership, and is that which is the foundation of ownership; and with a change of title, the right of property, the ownership passes." As applied to real estate it is defined to be "the means whereby the owner of lands or other real property has the just and legal possession and enjoyment of it," "the lawful cause or ground of possessing that which is ours." 2 Bouv. Law Dict. 986.

In this sense, which is also the ordinary and popular one in which the word is used, a "change in title" is a change in ownership which carries the legal right of possession and property, and it is in this sense we must understand the word as having been used in this clause.

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Although, within the meaning of the registry laws, a mortgage of real estate is defined to be a conveyance, yet under our laws it is not deemed a conveyance in the sense of passing any estate or interest in lands, or transferring any legal title thereto. The only interest which a mortgagee acquires is a lien upon the land in way of security, which, prior to the foreclosure of the right of redemption, is treated as personal property that goes to the administrator or executor and not to the heirs. The legal title, with the right of possession, remains with the mortgagor until a completed foreclosure is had by sale, and the same becomes absolute by the expiration of the period for redemption. Until this time expires the purchaser at the sale has only a chattel and equitable interest. He has no legal title to the lands nor any conveyable estate therein. The character of his interest is the same as that of a mortgagee before foreclosure sale. Gen. St., ch. 52, § 11; id., ch. 75, § 11; *Donnelly v. Simonton*, 7 Minn. 110 (167); *Horton v. Maffitt*, 14 id. 290-292.

Neither is a foreclosure by advertisement "legal process" or a "judicial decree." The proceedings in this kind of a foreclosure are carried on wholly outside of court and without the aid of its process or decree. It is obvious, then, that neither the giving of the mortgage nor the sale of the premises on foreclosure, the time for redemption not having expired, effected any change in title or possession in respect to the property insured, and did not, therefore, avoid the policy.

Order affirmed.

NASH V. MINNEAPOLIS MILL CO.

(24 Minn. 501.)

Negligence—liability for, as between landlord and tenant.

A mill company, owning land on the bank of a river, constructed a canal by which it furnished water-power to persons on both sides, to whom it rented mill sites, with a right of way across the canal. The canal was entirely covered over with a platform of wood, which had been used for ten years, to the company's knowledge, by all persons having business at those mills, for the purpose of passing and repassing. Among the tenants was M., who sublet, and whose tenant constructed that part of the platform opposite his

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premises. When the sublease expired, M. continued in possession under his lease. *Held*, that the duty of keeping the platform in repair, as to the public devolved on the company and not on M. *

ACTION against Minneapolis Mill Co. and its tenant, Morrison, for injuries sustained by the breaking of a platform. The opinion states the case. The defendants had judgment below.

Lochran, McNair & Gilfillan, for appellant.

Shaw & Levi, for respondent, Minneapolis Mill Company. The tenant built the platform for his own benefit, and the landlord had no right to dictate how it should be built, or in what manner it should be maintained. Taylor's Landl. and Ten. (2d ed.), § 175; *Saltonstall v. Banker*, 8 Gray, 195; *Owings v. Jones*, 9 Md. 108. Again, the tenant is *prima facie* liable for the defective repair of the leased premises, and the landlord is only responsible where he has contracted to make the repairs, or has been guilty of misfeasance. *Nelson v. L. B. Co.*, L. R. 2 C. P. 311; *Payne v. Rogers*, 2 H. Bl. 349; *Todd v. Flight*, 9 C. B. (N. S.) 377; *Russell v. Shenton*, 3 Q. B. 349; *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Gwinnell v. Gwamer*, L. R. 10 C. P. 631; S. C. 14 Moak's Eng. Rep. 492; *Gwathney v. L. M. R. Co.* 12 Ohio St. 92; *Pickard v. Collins*, 23 Barb. 444; *Taylor v. Mayor*, 4 E. D. Smith, 559; *Kahn v. Love*, 3 Or. 206; *Mayor v. Corliss*, 2 Sandf. 301.

Bradley & Morrison, for respondent, Morrison.

GILFILLAN, Ch. J. On the trial below, after the plaintiff had closed his case, the court dismissed the action as to both defendants, on the ground that plaintiff had failed to make out a cause of action.

There was evidence sufficient to go to the jury, from which they might have arrived at these conclusions of fact. The mill company owns, in the city of Minneapolis, a strip of land lying along the westerly bank of the Mississippi river, partly above and partly below the falls. Some years ago it constructed, for convenience in using this property for milling purposes, a canal about eighty feet wide at the upper end, and diminishing in width toward the lower end, extending through the strip nearly parallel with the river for the dis-

* See *McAlpin v. Powell* (70 N. Y. 196), 26 Am. Rep. 555, and note, 562; *Parker v. Portland Publishing Co.*, ante, p. 262.

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tance of probably 1,000 feet. Into this canal the water was taken at the upper end from the pond above the falls, and from the canal was furnished for water-power to the mills along its sides. The land along each side of the canal was let by the company to various tenants for mill sites, and to each tenant a right of way over the canal to the premises so let, granted. The canal for its entire length and breadth was covered with a continuous platform, constructed of timbers and plank, and this platform was, for at least ten years, and with the full knowledge and acquiescence of the defendants used in common by all who had business with the mills along the canal, in the same manner as a public thoroughfare is used, and that use of it was necessary to the convenient transaction of the business of the mills.

As to that part of the platform where the injury to plaintiff's property occurred, the facts are, that in 1863 the mill company let to the defendant, Morrison, for a term of years a mill site abutting on the canal, with the right to draw from the canal a specified quantity of water, and the right to pass over the canal adjacent to the mill site. In 1865 Morrison let a part of this mill site, with the right of way in common with himself over the canal, to Noble and Walker. Noble assigned to Walker, and Walker to Stamivitz and Schober, and they, during the continuance of this lease, constructed in front of the premises let to them the part of the platform in question. Since the end of Stamivitz and Schober's term, Morrison has been in possession under the lease to him of all the premises so leased. In August, 1876, plaintiff, who was hauling for the mill adjoining these premises, drove his team and halted it for the purpose of loading, upon this part of the platform, and while standing there the platform broke, letting his horses and wagon down into the canal, causing the injury complained of. There was evidence from which the jury might find that there was negligence in failing to keep the platform in safe condition, and that this negligence was the cause of the break. Neither of these defendants having constructed this part of the platform, the question is whether, in respect to persons coming upon it as plaintiff did, the duty of keeping it in safe condition rested upon the defendants, or either of them, and if so, upon which of them.

The rule of law governing the case is that the owner or occupant of real property is bound to use ordinary care and diligence to keep the premises in a safe condition for the access of persons who come thereon by his invitation, express or implied, for the transaction of

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business, or for any other purpose beneficial to him. Morrison was neither the owner nor the occupant of the canal, or the platform over it. He had merely the right of way over it in common with all others to whom the company might, so long as it did not prevent the exercise of his right, grant similar rights. The lease of the mill site gave him no other right. The case of the company is different. The land through which the canal was cut was, including the canal, and so far as the case shows, the platform covering it, real estate, and the exclusive property of the company, which it held subject only to the rights of way over it, which it had granted to others, and subject to such rights, it was in possession of this real property. Plaintiff had a right to go upon the platform in transacting business, with or for the tenants of the company occupying the mill sites along the sides of the canal. Whether the company itself constructed the platform, or permitted others to construct it, the platform was placed there, and by the company was permitted to remain there for the use of persons transacting business with those mills, and for the convenient using of the company's property. Without the right of such persons to go there this property would undoubtedly be of much less value, and that the company permitted the platform to remain there, to be used by such persons for its own benefit and advantage, there can be no question. It stands, then, in the position of an owner or occupant, who, for his own benefit, invites others to come upon his premises, and is subject to the same liability. The court below was wrong in dismissing as to the company, and right in dismissing as to Morrison. We do not refer in detail to the decisions of the court below excluding evidence offered by plaintiff; they were all erroneous. It was proper to show the character and history, and use of the entire platform covering the canal, and all the acts of ownership and control over it, or over the canal, on the part of the company.

The order appealed from is affirmed as to defendant Morrison, and reversed, and a new trial ordered, as to the defendant, the Minneapolis Mill Company.

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SHRIVER V. SIOUX CITY AND ST. PAUL RAILROAD COMPANY.

(34 Minn. 506.)

Carrier — negligence — burden of proof — presumption in case of connecting line.

A common carrier cannot, by contract, evade his liability for his own negligence, nor limit it to injuries caused by his gross negligence.

Where goods, specially accepted by a common carrier for transportation, are lost or injured, the burden of proof is on the carrier to show that the loss or injury was within the terms of the exception, and that he was not negligent.

Where goods pass over a line of several carriers, and are injured in transit, the jury, in the absence of direct proof to the contrary, may presume that they reached the last carrier in the same condition as when delivered to the first.

ACTION of damages for injury to goods in transportation. The opinion states the case. The plaintiff had judgment below.

E. C. Palmer, for appellant. The court erred in charging the jury that the contract between the parties could not be allowed to absolve the defendant from the consequences of its own negligence. *Bostwick v. B. and O. R. Co.*, 55 Barb. 137; *Maghee v. C. and A. R. Co.*, 45 N. Y. 514; *S. C.*, 6 Am. Rep. 124; *French v. B. and E. R. Co.*, 4 Keyes, 108; *Baltimore and O. R. Co. v. Rathbone*, 1 W. Va. 87; *Baltimore and O. R. Co. v. Skeels*, 3 id. 556; *Ill. Cent. R. Co. v. Smyser*, 88 Ill. 354; *Kimball v. R. and B. R. Co.*, 26 Vt. 247; *N. J. S. Nav. Co. v. Merchants' Bank*, 6 How. 344; *Cragin v. N. Y. Cent. R. Co.*, 51 N. Y. 61; *S. C.*, 10 Am. Rep. 559; *Mynard v. Syracuse R. Co.*, 14 N. Y. Sup. Ct. 399; *McCoy v. Erie and W. Trans. Co.*, 42 Md. 498; *Talbott v. Merchants' Dispatch Trans. Co.*, 41 Iowa, 247; *S. C.*, 20 Am. Rep. 589. In charging that the burden was on the defendant to show the want of ordinary care. *French v. B. and E. R. Co.*, 4 Keyes, 108; *Kallman v. U. S. Exp. Co.*, 3 Kan. 205; *Sager v. P. S. and P. E. R. Co.*, 31 Me. 228. In charging that the jury might presume negligence upon the part of the defendant, because the goods were damaged when delivered. Whart. on Ev., § 359; *Smith v. R. Co.*, 37 Mo. 287; *McCully v. Clarke*, 40 Penn. St. 399. In refusing to charge that the plaintiff could not recover unless she proved that the damage occurred through the negligence of the defendant, and without her contributing to such injury by

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defective packing. *B. and O. R. Co. v. Skeels*, 8 W. Va. 556; *Button v. H. R. R. Co.*, 18 N. Y. 248; *Bealieu v. Port Co*, 48 Me. 291; *Lindsay v. C. and P. R. Co.*, 27 Vt. 643; *Lane v. Crombie*, 12 Pick. 176; *Robinson v. Railroad Co.*, 7 Gray, 92.

Clarke & Soule, for respondent.

GILFILLAN, Ch. J. At Tiffin, Ohio, the plaintiff shipped, with the Baltimore and Ohio Railroad Company, two marble slabs, packed in a close box, consigned to herself, at Worthington, in this State, and upon the requirement of the company, executed an agreement releasing the company, and each and every other company over whose line the goods might pass to their destination, from any and all damages that might arise from certain specified causes, and "from any cause not arising from gross negligence of the said company or companies, its or their officers or agents." The slabs passed to their destination over the Baltimore and Ohio, and two other railroads, to St. James, in this State, and over the road of the defendant, from St. James to Worthington, and when delivered by the defendant to the plaintiff, at Worthington, were found to have been broken. This action was brought to recover damages for the injury.

[An unimportant point omitted.]

The court charged the jury, in substance, that common carriers of goods cannot, by contract, absolve themselves from the consequences of their own negligence, and that the contract proved could not be allowed to have that operation; that the burden of proof to show ordinary care was on the defendant, and that the jury might presume negligence from the fact that the goods were found to be damaged when delivered to plaintiff at Worthington.

Defendant excepted to these propositions in the charge, and requested an instruction that the contract was reasonable, and that the plaintiff could not recover without gross negligence of the defendant, which the court declined.

[An unimportant point omitted.]

The charge presents the question of the power of a common carrier of goods to limit, by contract, his liability, as it existed at common law. It is perhaps to be regretted that courts have allowed any relaxation of the common-law rule of liability. But that a common carrier may, by special agreement, qualify to some extent his

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liability, is too well settled by decisions to be denied. How far he may do it the authorities are not entirely agreed. The greater number of authorities in the United States hold, and, since *Christenson v. American Express Co.*, 15 Minn. 270; *S. C.*, 2 Am. Rep. 122, it is to be taken as the settled doctrine of this court, that a common carrier of goods shall not be permitted to exonerate himself by contract from liability for his own negligence, or the negligence of the agents whom he employs to perform the transportation. The contract in question seeks to exonerate the carrier from liability for all except gross negligence, and is obnoxious to the rule. The charge of the court upon it, and upon the rule, was correct.

When there is a contract limiting the liability to injuries caused by the negligence of the carrier, which party, the owner or the carrier, must show from what cause the injury or loss arose, is a question upon which there is some conflict of authorities. *Harris v. Packwood*, 8 Taunt. 264; *Marsh v. Horne*, 5 B. & C. 322; *French v. Buffalo, N. Y. and E. R. Co.* 4 Keyes, 108; *Sager v. S. and P. and E. R. Co.* 31 Me. 228, and *Kallman v. United States Express Co.* 3 Kan. 205, affirm the rule, without giving any reason for it, to be that the burden is on the owner. On the other hand, in 2 Greenl. Ev. § 219, the rule is stated, "and if the acceptance of the goods were special, the burden of proof is still on the carrier to show not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence or want of due care." And this rule is followed in *Swindler v. Hilliard*, 2. Rich. (S. C.) 286; *Baker v. Brinson*, 9 id. 201; *Davidson v. Graham*, 2 Ohio St. 131; *Graham v. Davis*, 4 id. 362; and *Whitesides v. Russel*, 8 W. & S. 44. The latter cases are most consistent with principle; for where there is no contract, there has never, so far as we know, been any question that the carrier, to escape liability, must show the case to have occurred from one of the causes which the law excepts from his liability. No good reason can be given why the burden should be changed because he has by contract added other exceptions to those made by the law. As to where the burden of proof was the charge was correct.

There was some evidence from which the jury might find that when delivered to the B. and O. R. Co. the slabs were in good condition. Between that company and the defendant there were two intermediate carriers. There was no direct evidence showing upon what part of the line, composed of the four railroads, or in the hands

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of which of the four carriers the slabs were broken ; and there was nothing to charge the breaking upon defendant, unless the jury might presume that the slabs continued, until they came into the hands of defendant, in the same condition as when delivered to the B. and O. R. Co. That where goods pass over a line of several different carriers, the jury, there being no direct evidence to the contrary, may presume that they reached the last carrier in the same condition as when delivered to the first, is discussed at length, and affirmed, in *Smith v. New York Central R. Co.* 43 Barb. 225, and *Laughlin v. Chicago and Northwestern R. Co.* 28 Wis. 204 ; *S. C.*, 9 Am. Rep. 493, the only cases we find in which the point is considered. Although the question is not free from doubt, we think the conclusion reached by the courts in these two cases correct. It is a rule of evidence that things once proved to have existed in a particular state are presumed to have continued in that state until the contrary is shown ; but it is not a rule of universal application. The probabilities in a particular case may prevent its application. The courts in New York and Wisconsin, there being nothing in the case to render the presumption improbable, apply it to a case like this, mainly because the carrier may ordinarily know, while ordinarily the owner cannot know, what happens to the goods, and what care is taken of them in their passage, and if they are lost or injured, when and how it occurred, and in what condition they came from the hands of a prior carrier into his. It is in part because of his superior ability to furnish the proof, that the *onus* of showing the cause of a loss or injury to be within the exceptions to his liability is imposed on the carrier. For the same reason we think that ordinarily a subsequent carrier should be required to show in what condition goods came into his hands, or that their condition did not change while they were in his keeping. The rule may seem hard, and so may seem the rule regulating the liability of the carrier, and fixing the burden of proof on him ; but public policy and the due protection of owners require that common carriers should be held to a severe liability.

J. J. Hunt affirms

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

BLOCK v. McMURRY.

(56 Miss. 217.)

Sunday — action to recover goods sold on — intoxication of vendor.

Although a contract of sale on Sunday is void, yet the seller cannot recover the chattels sold nor damages for their value.* Otherwise, if he had been intoxicated by the purchaser for the purpose of defrauding him.

PROVER. The opinion states the case. The plaintiff had judgment below.

Robert Lowry and M. Green, on the same side, for plaintiff in error.

A. J. McLaurin and C. C. Miller, for defendant in error.

SIDBALL, Ch. J. The proof is that McMurry sold and Kernaghan bought the horse in question on Sunday, Kernaghan paying the price and taking the horse into possession on that day. On the next day, Monday, the testimony tends to show that McMurry made a bill of sale to the wife of Kernaghan, at his request, because there was a judgment against him.

An effort was made to prove (both sides offered testimony on the point) that at the time of the sale McMurry was very much intoxi-

* See note, 3 Am. Rep. 371.

cated, so much so that he was incapacitated understandingly to make a contract, and further, that he was got into that condition by Kernaghan and his associates so as to take advantage of him.

Block afterwards bought the horse from Kernaghan, and this action of trover and conversion was brought against him by McMurry.

Two propositions have been argued by counsel: First, as to the effect of the statute on transactions had on Sunday; second, whether McMurry was incompetent to contract on account of drunkenness. It has been uniformly held, under statutes like ours, that a contract of sale made on Sunday is void. It has been several times so declared in this State. *Hoover v. Pierce*, 26 Miss. 627; *Kountz v. Price*, 40 id. 341; *Miller v. Lynch*, 38 id. 346. The cases have generally been suits on the contract itself or some stipulation connected with it, as in *Murphy v. Simpson*, 14 B. Mon. 419, where there had been what, in common parlance, is called a "horse swap." Each warranted the soundness of the animal which he exchanged. It was held that an action could not be brought on the warranty.

The authorities, without exception, lay down the rule that the contract if not within an exception is void because it is made a misdemeanor and punishable to do secular business on Sunday, which amounts to a prohibition.

This case presents a question which lies behind that. The seller insists that since the sale is *void*, no title to the horse passed to Kernaghan, and therefore he has a right to reclaim it or to recover damages for the conversion either against Kernaghan or any vendee from him. The argument is if the transaction is utterly void the original rights of neither party have been affected. It is as though no sale had been made. If the buyer has given an obligation for the price it is not binding. If he has got possession of the chattel the possession is without right to support it.

There are adjudged cases which have so ruled. *Dodson v. Harris*, 10 Ala. 569; *Adams v. Gay*, 19 Vt. 358, cited from note to 2 Pars. on Con. 764. But these authorities rest on a misconception and misapplication of the principle and the reason of it. When it is declared that the Sunday contract of sale is void, the precise extent of that doctrine practically is that the courts will not give the remedies of the law to assist either party engaged in the illegal transaction. They will not help the seller to recover the price, nor can the buyer maintain an action on any warranty, deceit or fraud in the sale.

In such case the seller has parted with his property for the obliga-

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tion of the buyer, solvable in the future. The courts will lend the seller no aid to get what he was promised for his horse. If all redress is denied to the seller, the principle, in its full and just application, would deny a reclamation by the buyer of the price which he had paid, and to the seller the chattel which he had delivered.

The law observes a strict and impartial neutrality; it will not interpose at the solicitation of either party, but says to both: "This transaction was a violation of the statute; both of you are equally guilty, and each of you must remain in the position in which you have placed yourselves."

The cases of *Dodson v. Harris*, 10 Ala. 569, and *Adams v. Gay*, 19 Vt. 358 (the latter cited from note to 2 Pars. on Con. 764), hold that the contract of sale being void, if the property has been delivered, the seller may, on another day, demand the property, and if not returned may bring trover, but that the possession being *permissive*, there must be actual demand before suit brought. These authorities refer to cases which hold that though the note for the property cannot be recovered upon, yet if there is a *subsequent* promise that may be the basis of a recovery.

The better doctrine is announced in *Smith v. Bean*, 15 N. H. 578, that is, that when it said the contract is void it has reference to the question whether there is any legal remedy upon it. "The purchaser has possession, as of his own property, by the assent of the seller and the law leaves the parties where it finds them." The reason was clearly and forcibly stated by Lord MANSFIELD in *Holman v. Johnson*, Cowp. 343: "The object of the statute is for the benefit of the public and not the advantage of the defendant." "It is founded on the policy that no court will lend its aid to an illegal act. The parties will be left where they placed themselves," etc.

The courts of Massachusetts once announced principles in accord with the cases cited from Vermont and Alabama. But the later cases distinctly repudiate that doctrine. Thus, in *Myers v. Meinrath*, 101 Mass. 368; S. C., 3 Am. Rep. 368, which was trover, brought by a plaintiff who had returned the property which he had received against the other party, who retained what he had got in exchange, the action was not allowed.

In *Horton v. Buffington*, 105 Mass. 399, an attachment would not lie on the property in the hands of a third person, who obtained it from a Sunday purchaser as the property of the original owner, for the reason that the disability of the original owner to reclaim would

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avail the party holding as a sufficient title. See Chitty on Con. (10th Am. ed.) 732.

The courts leave the parties alone, not on any idea of giving effect to the illegal contract, but because it imputes disability to the parties of asserting any right to recover. The series of instructions on behalf of the plaintiff, affirming a right in McMurry to recover because the sale was void, are erroneous.

If the jury should be satisfied that McMurry was intoxicated to the degree that he was not competent to understand the nature and quality of the business, or to make a contract, then the parties are not *in pari delicto*, and he would not be bound by the sale, although made on Sunday.

Judgment reversed and cause remanded.

CUNNINGHAM V. STATE.

(56 Miss. 239.)

Criminal law — murder — insanity — burden of proof — rule of responsibility.

Every man is primarily presumed sane, but when facts are proved tending to engender a doubt of the sanity of a person accused of crime, it devolves on the State to remove that doubt and establish the sanity of the prisoner to the satisfaction of the jury, beyond all reasonable doubt. (See note, p. 368.)

Insanity, to excuse crime, must be such as destroys the power of distinguishing between right and wrong. *

CONVICTION of murder. The opinion states the facts.

Collins & Raspberry, for plaintiff in error. There is such a thing as killing a person under an uncontrollable impulse, with a deliberate design to effect his death. This paroxysmal insanity is recognized by our courts. *Commonwealth v. Rogers*, 7 Metc. 500. A person may know that the act is wrong when he does it, and yet not be a criminal in the eyes of the law, owing to such lesion of the will, or to an insane delusion. *Hadfield's Case*, 27 How. St. Tr. 1281. We refer the court to the following authorities: *Martin's Case*, 71 Anno

* To same effect, *Flanagan v. People* (52 N. Y. 467), 11 Am. Rep. 731. See *Anderson v. State* (48 Conn. 514), 31 Am. Rep. 662.

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Reg. 301; *Regina v. Tyler*, 8 C. & P. 616; *Tonchett's Case*, 1844, in the Central Criminal Court; *Bricey's Case*, in same court, 1845; *Regina v. Vyse*, 3 Fost. & Fin. 247; *Roberts' Case*, 3 Ga. 310; *People v. Pine*, 2 Barb. 571; *Regina v. Law*, 2 Fost. & Fin. 836; *State v. Windsor*, 5 Harr. 512; *Regina v. Bleasdale*, 2 Car. & Kir. 765; *Commonwealth v. Mosler*, 4 Barr, 267; Lewis on Cr. Law, 404; *People v. Sprague*, 2 Park. 43; *Sanchez v. People*, 4 id. 535; 2 Am. Jour. Insanity, 26; *U. S. v. Hewson*, 7 Boston Law Rep. 361; Stephen's Cr. Law, 91; *Scott v. Commonwealth*, 4 Metc. (Ky.) 227; *Smith v. Commonwealth*, 1 Duv. 224; *Hopps v. State*, 31 Ill. 385; *Billman's Case*, 1 Whart. Cr. Law, 30; *Commonwealth v. Shurlock*, Leg. Int. 83; *Commonwealth v. Smith*, id. 33; *Commonwealth v. Freath*, 6 Am. Law Reg. 400; *Regina v. Haynes*, 1 Fost. & Fin. 666; *State v. Brandon*, 8 Jones, 136.

T. C. Catchings, Attorney-General, for State. The charges do not require the prisoner to establish her insanity beyond a reasonable doubt; but the instructions, on the contrary, laid down the law as announced repeatedly in this State. *Bovard v. State*, 30 Miss. 600; *Newcomb v. State*, 37 Miss. 405; *Kelly v. State*, 3 Smed. & M. 528. If the charges did, however, require such conclusive proof of insanity to be made by the accused, they would have the countenance of many high authorities, and, I think, that is the law. 1 Whart. Cr. Law, § 55; 2 Bishop's Cr. Proc., §§ 670, 672; Whart. on Hom., §§ 665, 666; 2 Greenl. on Ev., §§ 372, 373. Sanity is always presumed, and the State therefore may rely upon this presumption until it is broken down or overthrown by testimony sufficient to satisfy the jury of the insanity. When this has been done, the burden of overcoming this counter-proof is shifted to the State; and then, unless the State, by testimony again satisfactory to the jury, establishes sanity, the defendant must be acquitted.

CHALMERS, J. Adeline Cunningham was convicted, in the Circuit Court, of Clay county, of the murder of her husband, and sentenced to be hung.

That she committed the deed, and that it was one of peculiar atrocity, is not denied nor gainsaid.

In the dead hour of night, while the husband lay sleeping on the common bed, she split open his head with a hatchet, without provocation or motive, so far as can be ascertained. She waited quietly

till morning came, and then freely and voluntarily avowed the act to all inquirers, offering no excuse, save that to one person she stated that her husband was attempting to take her life with a knife, which, she said, would be found in the bed, but which could nowhere be discovered.

The defense set up for her is temporary or periodic insanity, produced by derangement in her monthly menstruations, and which it is said was liable to attack her at each recurring monthly period.

Without desiring to express any opinion on the facts, it is proper to say that there was sufficient evidence to suggest at least a possibility of the truth of her defense, and to demand that the jury should be left free to determine the question, unembarrassed by erroneous instructions from the court.

They were not so left. By the first instruction given for the State, they were informed that "the legal presumption of sanity is not overcome by the mere probability that the party was insane, but will stand until overthrown by evidence. Mere probability of insanity cannot prevail over the presumption of sanity, so as to work the acquittal of the party on the ground of insanity. For a defense resting on the ground of insanity, the insanity must be clearly proved."

In other words, the jury were told that though they believed the defendant probably insane, she must be convicted on some presumption of law which overthrew all probabilities of fact.

Is this a sound principle of law? Undoubtedly there are numerous authorities which so declare, as there are many also going far beyond this, and holding that the defense of insanity can never avail unless its existence is established to the exclusion of every reasonable doubt. There is perhaps no subject connected with criminal law upon which the authorities are more hopelessly in conflict than the one here presented.

Three distinct theories are held by courts and text-writers of the highest character, and each may be supported by a long array of respectable authorities, viz.: 1. The prisoner must prove his insanity beyond a reasonable doubt. 2. He must establish it by a preponderance of evidence. 3. He must raise a reasonable doubt as to his sanity.

The first of these views receives most countenance from English adjudications and text-books; the second is supported by a majority of the American courts; while the third, though held as yet perhaps by a minority of the adjudged cases, is gaining in favor, is the well-

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settled law in many of the States, and is supported by a power of reasoning which we deem convincing.

Every indictment charges the commission of a criminal act by a responsible being, and no conviction can occur until the jury shall have been satisfied beyond all reasonable doubt that such an act has, by such a being, been committed. Sanity is the normal condition of the intellect; so that when the party indicted is seen to be a human being, the presumption of the law (because it is the presumption of common sense) is that the person is sane.

Hence, in the absence of evidence to suggest the contrary, the jury acts on this presumption, and the deed being proven, the conviction follows. But if in proving the deed, evidence is offered which suggests a doubt of the party's sanity, the State must promptly meet it, and this without regard to the side from which the proof suggesting the doubt comes. The law clothes the accused with a presumption of innocence which he never loses until a verdict of conviction has been pronounced. He pleads nothing affirmatively, save in rare and exceptional instances, but by his plea of not guilty he puts upon the State the burden of establishing every fact necessary to constitute guilt. The changing phases of the evidence may make his case at various stages wear various aspects. At one moment it may seem that his guilt has been conclusively shown, and at the next it may appear to have been as conclusively negatived; but his own attitude never changes. To every fresh development and every new circumstance he repeats his plea of not guilty, and in every new complication he rests upon his legal presumption of innocence. The testimony offered against him may indeed necessitate the production of something on his part to meet the case as made out; but it can never do this until, uncontradicted and unexplained, it has demonstrated his guilt beyond a reasonable doubt. Shall it be said, that because this has been accomplished at some particular stage of the testimony, the burden of proof has shifted, and thenceforward the duty is imposed upon him of re-establishing his innocence beyond all reasonable doubt? Nobody would venture so to assert, if the demonstration of guilt so made out was in regard to the commission of the act. Why should the rule be different in reference to the mental accountability of the defendant? There can be no crime without mental accountability, and it is just as essential to show the conscious mind as the unlawful act. But it is said that the law presumes sanity. So the law presumes malice from the fact of killing;

but if anything in the testimony, either of the State or of the defendant, suggests a reasonable doubt of its existence, nobody ever supposed that the State could stop short of removing this doubt, and of establishing the malice to a moral certainty.

The presumptions or implications, which, in criminal cases, the law deduces from the establishment of particular facts, have no other force than to dispense with further proof of the thing presumed, unless something in the testimony, either theretofore or thereafter offered, suggests a doubt of the existence of the presumed fact. But the moment that doubt is engendered in reference to it, if it be as to a fact necessary to conviction, the State must establish the fact independently of the presumption; and the obligation to do this rests continuously upon her. The accused need do nothing save repose upon the presumption of innocence with which the law has clothed him, and claim the benefit of all the doubts which the testimony has evolved.

Apply these principles to the question of sanity. Because he is a human being, the accused is presumed to be sane. He must be sane in order to be guilty. The trial commences with the presumption that he is so. If nothing in the testimony suggests otherwise, there is no obligation to establish it; but the moment the proof warrants a reasonable doubt of it, no matter from which side it comes, that doubt must be removed. Which side must remove it? Manifestly that side which set out to show guilt, because there can be no guilt without sanity. That condition of sanity which is ordinarily the attribute of all men has been rendered doubtful as to this particular man, and as his guilt depends upon his sanity, its existence must be shown in the same manner, and to the same extent, as any of the other elements which go to make up the crime. What logic or consistency can there be in saying that all the other elements must be established beyond a reasonable doubt, but that this one — certainly as essential as any other — may be assumed on less satisfactory proof? True, the case started with the theory that it existed, but can this in anywise affect the condition in which it must be left at the close, if it has during the progress of the trial been rendered doubtful? How can a jury say, We have no doubt of the guilt of the prisoner, but we do doubt whether he was sane? If a jury in a capital case should bring in such a verdict, would it not be judicial murder to inflict a sentence of death? And yet many such verdicts are practically inevitable under a theory of the law which holds

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that the burden of proving insanity rests upon the accused, and that he must be convicted unless he has clearly proved it beyond all probability, or beyond all reasonable doubt.

We think the true rule is this: Every man is presumed to be sane, and in the absence of testimony engendering a reasonable doubt of sanity, no evidence on the subject need be offered; but whenever the question of sanity is raised and put in issue by such facts, proven on either side, as engender such doubt, it devolves upon the State to remove it, and to establish the sanity of the prisoner to the satisfaction of the jury, beyond all reasonable doubt arising out of all the evidence in the case. *Pollard v. State*, 53 Miss. 410; *People v. McCann*, 16 N. Y. 58; *State v. Bartlett*, 43 N. H. 224; *State v. Crawford*, 11 Kan. 32; *Polk v. State*, 19 Ind. 170; *Hopps v. State*, 31 Ill. 385; *Ogletree v. State*, 28 Ala. (N. S.) 701.

When we speak of insanity as an excuse for crime, we refer, of course, to such degree of insanity as disqualifies from a proper perception of the difference between right and wrong, and thereby shields its victim from legal accountability for his acts. *Bovard's Case*, 30 Miss. 600.

We find in the record, among the instructions asked by the defendant, one numbered twelve, in which the rule here laid down is announced, to wit, that the jury must acquit if they entertain a reasonable doubt of the sanity of the accused. This instruction is neither marked "given" nor "refused," and we have no means of discovering what was the action of the court upon it. If it was refused, such refusal was erroneous, because it correctly enunciated the law. If it was given, it was in direct conflict with the fifth instruction for the State, upon which we have been commenting, and the giving of conflicting instructions is erroneous.

The ninth instruction asked by the defendant, and refused by the court, was in these words: "Where the delusion of a party is such that he has a real and firm belief of the existence of a fact which is wholly imaginary, and under that insane belief he has done an act which would be justifiable if such fact existed, he is not responsible for such act. Nor is a party responsible for an act done under an uncontrollable impulse which is the result of mental disease."

The doctrine announced in the first clause of this instruction first found distinct utterance in the celebrated prosecution of Hadfield for the attempted assassination of King George III (20 How. St. Tr. 1281), and owes its birth and adoption into the English law to

the genius and eloquence of Erskine. It has been repeatedly since recognized both in England and America, notably in this country in *Commonwealth v. Rogers*, 7 Metc. 500, and in *Roberts v. State*, 8 Ga. 310. Of its correctness there can, we think, be no doubt. Indeed, though it has by some courts been denied recognition, it seems to us only another method of stating that there can be no crime where there is a mental incapacity to distinguish between right and wrong; for though delusions as to particular matters frequently exist in minds which are perfectly rational upon all other subjects, yet if the delusion be so fixed and vivid as to make the imaginary seem the real, there must be upon that subject a total incapacity to distinguish between right and wrong, since the entire relation between the victim of the delusion and its unconscious subject being mentally perverted, there can be no proper standard of right and wrong in the diseased mind. That which to the rest of the world seems right is to him the most flagrant wrong, and *vice versa*. If to his deluded imagination his best friend, or the wife of his bosom, seems a relentless foe, bent upon his destruction, he necessarily acts upon the hallucination which possesses him; and if his action is such as would be justifiable or proper if the reality was as he supposes it to be, there can be no accountability, because there has been no conscious crime.

If a crazed enthusiast violates the law, impelled by a madness which makes him deem it the inspired act of God, he has only done that which his diseased and deluded imagination taught him was right; and if the act would be proper in one so divinely inspired, and was the direct and necessary consequence of the delusion, there can be no punishment, because, however rational on other subjects, he was on that subject incapable of having a criminal intent.

The juries must, under the instructing guidance of the courts, be the judges of the sincerity and firmness of the belief, and of whether the act was in truth the direct and necessary result of the insane delusion. There is but little danger that the sober common sense of mankind will be deceived by a feigned madness, or will fail to detect the craftiest imposter, who, under the guise of insanity, violates the criminal law. The danger rather is, that indignation at the crime and incapacity to appreciate the delusion will make them incredulous of its existence.

We think that the first clause of the instruction, which is taken substantially from the opinion of Chief Justice SHAW, in *Commonwealth v. Rogers*, *supra*, announces a correct principle of law.

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The second clause declares that there is no responsibility for "an act committed under the uncontrollable impulse resulting from mental disease." If the impulse meant is the direct result of such mental disease as destroys the perception of right and wrong, this is only a reaffirmation of the doctrine announced in several preceding charges, and it derives no additional strength from the prefix of the word "uncontrollable." But there is said to be an uncontrollable impulse springing from a mental condition quite different from this, a state of the mind which perfectly perceives the true relations of the party and recognizes all the obligations thereby imposed, but which, it is said, is unable to control the will.

This character of insanity is variously styled moral or emotional, or impulsive or paroxysmal insanity. It is known among medical writers as lesion of the will. Its peculiarity is said to be that while the mental perception is unimpaired the mind is powerless to control the will; that while its unhappy subject knows the right and desires to pursue it some mysterious and uncontrollable impulse compels him to commit the wrong. This kind of insanity, if insanity it can be called, though sometimes recognized by respectable courts, and still oftener, perhaps, by juries seeking an excuse to evade the stern dictates of the law, is properly rejected by the authorities generally. The possibility of the existence of such a mental condition is too doubtful, the theory is too problematical and too incapable of a practical solution, to afford a safe basis of legal adjudication. It may serve as a metaphysical or psychological problem to interest and amuse the speculative philosopher, but it must be discarded by the jurist and the law giver in the practical affairs of life. To it may well be applied the language of Judge CURTIS, who, in speaking of this and similar questions, says: "They are an important as well as a deeply interesting study, and they find their place in that science which ministers to diseases of the mind. * * * But the law is not a medical nor a metaphysical science. Its search is after those practical rules which may be administered without inhumanity for the security of civil society by protecting it from crime, and therefore it inquires not into the peculiar constitution of mind of the accused, or what weakness or even disorders he was afflicted with, but solely *whether he was capable of having, and did have, a criminal intent.* If he had it punishes him, if not it holds him dispunishable."

United States v. McGhee, 1 Curt. 1.

The latter clause of the instruction in question is copied, as indeed

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the whole instruction is, from the syllabus or head-notes of *Commonwealth v. Rogers*, 7 Metc. 500, but it fails to embody the qualification and restriction thrown around the doctrine in the opinion itself.

The uncontrollable impulse which the learned chief justice declares will excuse the act is said to be that "which overwhelms reason, conscience and judgment." "If so," says he, "then the act was not the act of a voluntary agent but the involuntary act of the body without the concurrence of the mind directing it." In other words, it is the uncontrollable act of a mind destitute of reason, conscience or judgment as to the particular object, however sane as to other matters. The latter clause of the instruction, therefore, should have been restricted by words conveying the idea that the act was the direct result of an uncontrollable impulse springing from mental disease, existing to so high a degree that for the time it overwhelmed the reason, judgment and conscience.

The exceptions taken to the action of the court in its rulings on the evidence are without merit.

For the errors indicated in the instructions the judgment is reversed and a new trial awarded.

NOTE BY THE REPORTER.—Opposed to this decision is *Ortuoin v. Commonwealth*, 76 Penn. St. 414; *S. C.*, 18 Am. Rep. 420. The rule is thus stated in *Brotherton v. People*, 53 N. Y. 139: "Crimes can only be committed by human beings who are in a condition to be responsible for their acts, and upon this general proposition the prosecutor holds the affirmative, and the burden of proof is upon him. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence a prosecutor may rest upon that presumption without other proof. The fact is deemed to be proved *prima facie*. Whoever denies this or interposes a defense based upon its untruth, must prove it; the burden, not of the general issue of crime by a competent person, but the burden of overthrowing the presumption of sanity and of showing insanity, is upon the person who alleges it, and if evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts, and upon this question the presumption of sanity, and the evidence, are all to be considered, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of the doubt, and to an acquittal. The question may be stated in a variety of language. There is no rigid rule prescribing the particular terms to be employed, if the substance of the rule is preserved.

"The judge, in this case, among many others not criticized, used this expression: 'This allegation of insanity is an affirmative issue which the defendant is bound to prove, and you must be satisfied from the testimony introduced by him that he was insane.' And he also charged that if 'there is a well-founded doubt whether this man was insane at the time he fired the pistol, you will acquit him.' Take the two paragraphs of the charge together, there was no error. The prisoner was bound to prove that he was not sane, and whether insanity is called an affirmative issue, or it is stated that the burden of proof of insanity is upon the prisoner in order to overcome the presumption of sanity, is not very material if the jury are told, as they were in this case, that a reasonable doubt upon that question entitled the prisoner to an acquittal. The jury could not have misunderstood their duty under these instructions, nor have been misled by them, and if an exception had been taken it must have been overruled."

See, "The plea of Insanity, as an answer to an indictment," by John Ordronaux, 1 Crim. Law Mag. 431.

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HARKREADER V. CLAYTON.

(56 Miss. 383.)

Deed — escrow — bona fide purchaser.

No title vests in a grantee who obtains possession of an escrow without performance of the condition, and a *bona fide* purchaser from him, after the death of the grantor, acquires no title.*

THE opinion states the case.

Houston & Reynolds, for appellant.

1. The testimony shows that Wiley delivered his deed to Drane as an escrow, to be delivered to the Merritts upon the contingency of their paying the note for the purchase-money, which note Drane also held for collection, with authority either to collect in person or through attorneys; and that the money was paid and the deed delivered. In such case, the deed relates back to the first delivery, so that the intervening death of the grantor cannot affect the passing of the title. *Whitfield v. Harris*, 48 Miss. 719; *Simpson v. McGlathnery*, 52 id. 723. The depository of the deed is the agent of both the grantor and grantee. *Wheelwright v. Wheelwright*, 2 Mass. 446; 3 Am. Dec. 66; *Foster v. Mansfield*, 3 Metc. on Con. 472; *Frost v. Beekman*, 1 Johns. Ch. 288; 3 Washb. on Real Prop. 272; 4 Cruise on Real Prop. (Greenl.) §§ 73, 74; Shep. Touch. 58, 59.

2. The Merritts having possession of the escrow deed when Harkreader purchased for full value, without notice, the latter is an innocent purchaser. It is only required that the title purchased be apparently good and perfect at law. *Wailes v. Cooper*, 24 Miss. 208; *Walton v. Hargroves*, 42 id. 27; *Perkins v. Swank*, 43 id. 358; Amb. 293. A *bona fide* purchaser, for value and without notice, may defend under his title when he could not enforce it in equity. *Beekman v. Frost*, 18 Johns. 544; 1 Story's Eq. Jur., §§ 410, 411. The rule, in such case, is founded on principles of public policy. *Walwyn v. Lee*, 9 Ves. 24; 1 Story's Eq. Jur., §§ 409, 411; *Lee v. Port-*

* To same effect, *Chipman v. Tucker* (38 Wis. 48), 30 Am. Rep. 1; *Miller v. Fletcher* (27 Gratt. 405) 31 Am. Rep. 356.

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Wood, 41 Miss. 109; *Lusk v. McNamer*, 24 id. 58; Story on Sales, § 159. It applies to real and personal property alike. *Wyse v. Dandridge*, 35 Miss. 688. Where one of two innocent parties must suffer damage, it must fall on the least diligent, if their positions are distinguishable; but if not, they must be left to their legal remedies. 1 Greenl. on Ev., § 207; *Dickson v. Green*, 24 Miss. 618; 1 Johns. Ch. 373; 1 Story's Eq. Jur., § 387; *Divoll v. Leadbetter*, 4 Pick. 219.

3. If the deed was delivered to the attorneys as an escrow, to be delivered to the Merritts upon the payment of the purchase-money to the attorneys, and after the death of Wiley the purchase-money was paid and the deed delivered, the title vested in the Merritts, even though they knew of the death of Wiley. In such case, the deed takes effect by relation, in respect to the title, from the original delivery, and its effect is not impaired by the death of the grantor. 2 Minor's Inst. 659; 2 Lomax's Dig. 37; 3 Preston on Abst. Title, 63; 3 Co. Inst. 352; *Teneick v. Flagg*, 29 N. J. L. 25; *Keirsted v. Avery*, 4 Pai. 1.

Clayton & Clayton, and *Blair & Clifton*, for appellees.

SIMBALL, Ch. J. This case has been heretofore in this court, on appeal from the order of the chancellor sustaining the demurrer and dismissing the bill. The cause was remanded, that the heirs of Leroy Wiley, deceased, might be made parties. They were necessary parties, inasmuch as the object of the suit was to specifically enforce the contract of their ancestor, and they therefore would be interested in any question affecting the title to the land. The relief sought by the complainant, administrator, etc., of Wiley, was to collect the balance due for purchase-money, by a sale of the land, if the original vendee, the Messrs. Merritt, or their vendee, Harkreader, did not pay it. Many of the questions litigated in this appeal were settled on the former. See report of case, 52 Miss.

A brief summary of the case stated by the complainant is, that the suit brought in 1868, in the name of Leroy Wiley, to collect the money by a sale of the land, and which resulted in a decree and sale, and purchase by the Messrs. Merritt, was instituted after the death of Wiley, and of consequence the entire proceedings, including the sale, were utterly null, and of no effect; and therefore the land may be subjected, in this suit, to the payment of the debt due to Wiley's personal representative. It is averred in the bill, and admit

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ted by Harkreader in his answer to the amended bill, that Wiley, in 1867, signed, sealed and acknowledged, in the State of Alabama, a deed in due form, and transmitted it to Col. Drane, to be delivered to the Messrs. Merritt on payment of the balance of the purchase-money; that Drane tendered the deed to them, and requested payment of the money; that they declined to pay; that thereupon Drane delivered the deed and the note to Tucker, Green & Pickens, for the purpose of bringing the proper suit. Harkreader states that the Messrs. Merritt bought under the decree, paid the bid to the solicitors, and received the deed from the commissioner; and that when they paid the bid, they withdrew from the files the deed from Wiley to themselves, with the consent of the solicitors. He states that at the date of the sale, neither the Messrs. Merritt nor himself knew of the death of Leroy Wiley; nor was he aware of it when he purchased from them on the 1st of January, 1872.

On these allegations, this defendant insists that he is a *bona fide* purchaser, without notice of Wiley's death, and of the invalidity of the decree and sale; and secondly, that the withdrawal of the deed of Wiley, with the consent of Messrs. Green, Pickens & Tucker, the solicitors, invested them with the legal title, or the power to pass it to a purchaser.

It is plain that Wiley transmitted the deed to Drane, to be delivered to the Messrs. Merritt on payment of the money. The contract between the vendor and the vendees was, that the title should be retained until payment. Drane had authority to secure the money; in truth, the deed was sent to him that he might make a demand of the money, efficient to complete the right of Wiley to subject the land to its payment, if the Messrs. Merritt were put in default. Drane so understood his duty to Wiley, for immediately he placed the papers in the hands of the solicitors for suit.

Four days before they exhibited the bill against the Messrs. Merritt, Wiley died. His death, as held on the former appeal, put an end to the power of Drane or the solicitors to proceed further in the business. The rights of Wiley in the money and to the land had been transmitted to his personal and legal representatives. When the solicitors took the first step, they occupied no fiducial relation to Wiley, nor could they. In ignorance of his death, they conducted through the Court of Chancery a solemn farce in his name, as the living actor. The Messrs. Merritt, in the like ignorance, bought under the decree.

It is urged, in argument, on behalf of Harkreader, that conceding the Messrs. Merritt could not set up the deed of Wiley as against his heirs or devisees, nevertheless the deed was exhibited to him, as part of their chain of title, before he purchased; and having bought in ignorance of Wiley's death, he is not chargeable with any of the circumstances that might be set up against them.

That brings us to the inquiry, whether Harkreader occupies a better position than his immediate vendors.

The final and complete act which makes a deed effectual is *delivery*. Whilst no specific formalities are necessary, the grantor must consent that the deed shall pass irrevocably from his control, and the grantee must accept it. If from what occurs between grantor and grantee, a delivery and acceptance may be implied, it is equivalent to an actual delivery. It is the assent, express or implied, to the act, which gives it efficacy. *Morgan v. Hazlehurst Lodge*, 53 Miss. 674. But if the grantor make and seal an instrument as his writing or escrow, and deliver it to a third person, to be by him delivered to the grantee upon some future event, and it be delivered accordingly, it is not the grantee's deed until the second delivery. If the grantee obtains possession of it before the event happens, the grantor may avoid it on the plea of "*non est factum*." 3 Co. 35 *b*, 36 *a*; *Doe v. Knight*, 5 B. & C. 671; *Cecil v. Butcher*, 5 Jac. & W. 87. Although such deed generally takes effect from the second delivery, there are exceptional cases where it would relate back to the first. The exceptions are founded on necessity, to prevent a failure of justice — "*ut res valeat quam pereat*." Some of these exceptions are enumerated in *Simpson v. McGlathnery*, 52 Miss. 724, and *Wheelwright v. Wheelwright*, 2 Mass. 453. If delivery is to a stranger, to be transmitted to the grantee on conditions to be performed, the estate does not pass until the second delivery. If the grantee gets the deed before the conditions have been complied with, the estate does not pass. That is so because the grantor has not *consented* to the delivery. As to him, the instrument has not lost its character as a mere written scroll. Though having all the formalities of a complete instrument, it remains a scroll until the event has happened on the occurrence of which the grantor has agreed that it shall be effectual to pass the title. It would seem to follow, that if the grantee gets possession of the instrument surreptitiously, or on any other terms than fulfilling the conditions, there has not been a delivery with the assent of the grantor, and the title would not be

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conveyed. The authorities are abundant in support of that proposition. In *Beem v. McKusick*, 10 Cal. 538, it was said "that a compliance with the agreement was the *only* condition on which Beem, the grantee, could acquire the title;" and not having complied with the condition, the "title was void." In *Dyson v. Bradshaw*, 23 Cal. 528, it was repeated that the grantee acquired no title by the deed, except on *strict compliance* with the conditions on which delivery was to be made. *Black v. Shreve*, 13 N. J. Eq. 455; 3 Washb. on Real Prop. 272.

Following the doctrine to its legitimate logical application, the conclusion would be that a grantee who had got the deed without complying with the condition, not having title himself, could not convey to an innocent purchaser, who might have been misled by seeing the deed in his possession.

That precise question was presented in *Everts v. Agnes*, 4 Wis. 356. Here, the deed was left with Zetler as an escrow, with instructions not to be delivered until certain securities should be given by Agnes. Agnes fraudulently got possession of the deed, by inducing Zetler to deliver it without executing the securities, and had it recorded, and sold to Swift for a valuable consideration, who was ignorant of the fraud. The court held that Agnes obtained no title, and "he could not convey any, by any conveyance he could make to another." The sum of the reasoning is, that obtaining the deed by fraud, larceny or any means short of the performance of the condition, is against the assent of the grantor; and as assent is necessary to a delivery, and a delivery to the validity of the deed, the grantee got no title, and could not transmit any. If Swift purchased on the faith of the record, the answer was, the registration of an escrow did not give it validity as a deed. That case was afterwards reconsidered, and its doctrine reaffirmed. 6 Wis. 457.

Harkreader, as the vendee of the Messrs. Merritt, stands precisely in their shoes, and the doctrine of an innocent purchaser without notice has no application to him.

A deed contrived to injure and defraud creditors is the *deed* of the grantor; it has become complete by *delivery*. A purchaser from the fraudulent grantee, in good faith, without notice of the fraud, acquires the title, acquitted of the equity in favor of creditors of the grantor. The deed was competent to convey the title, subject to be avoided by creditors, provided they assailed it before it had been transmitted to a *bona fide* purchaser. So, a purchaser of the legal

estate will hold it, discharged of all secret equities of which he had no notice. But in all cases where the plea of an innocent purchaser can be interposed, the party must have acquired the *legal title*, which he thus attempts to protect against some undisclosed equity or charge on the property. It is plain that Harkreader cannot take shelter under that plea, because he has not a *legal title* to the property. That is still outstanding in the heirs or devisees of Wiley. It is sufficient to rest this conclusion on the predicate that Wiley was not alive when the Messrs. Merritt got the deed. Drane was dead also.

There are cases which hold, with great plausibility and force of reasoning, that if the agent of the grantor delivers the deed to the grantee without conditions performed, an innocent purchaser from the grantee will be protected. *Blight v. Schenk*, 10 Penn. St. 293; *Pratt v. Holman*, 16 Vt. 530. But it has been urged that Harkreader has the better equity. We think that the superior equity is with the heirs and devisees, who have never realized the price of the land. At all events, it is equal to that of Harkreader; and when the equities are equal, the legal title will prevail. 4 Kent's Com. 459; *Frost v. Beekman*, 1 Johns. Ch. 248; 1 Story's Eq. Jur., §§ 75, 76; *Everts v. Agnes*, 4 Wis. *supra*. If Messrs. Tucker, Green & Pickens, the solicitors, had paid the money collected from the Messrs. Merritt to the personal representative of Wiley, there would have been a satisfaction of the debt, and the Merritts could not have been disturbed in their right. Their equity would have been complete. The payment of the money to Mrs. Drane, the administratrix of her husband, was unauthorized.

[Omitting minor considerations.]

The respondents did not, by any of their defenses, obviate the complainant's equity.

The decree is affirmed.

 Moore v. Christian.

MOORE v. CHRISTIAN.

(88 Miss. 408.)

Parent and child — right of father to confer custody of child as against widow.

A father gave his son, ten years of age, to a man of good character and ample means, to keep him during minority. The father dying three years afterward, the mother brought *habeas corpus* for the child. *Held*, that she was entitled to his custody, although she was poor and dependent, and he preferred remaining with defendant.*

HABEAS CORPUS. The opinion states the facts. The defendant had judgment below.

Newman Cayce, for appellant.

Blair & Clifton, for appellee.

1. Christian does not deprive the mother of her child. He uses no restraint. The boy is at liberty to leave at pleasure, but he prefers to remain. The illegal restraint is the foundation of the right to this remedy, and without that the writ of *habeas corpus* cannot be sustained. *Foster v. Alston*, 6 How. (Miss.) 406. Our statutes do not enlarge the remedy so as to change this rule. Acts 1876, p. 32; Code 1871, § 1396.

2. The boy wants to stay with Christian. To force him back to his mother would be depriving him of his liberty; and this, where Christian is every way fitted to care for him, and the mother poor and dependent, in many ways unfit. *Maples v. Maples*, 49 Miss. 393; *Cocke v. Hannum*, 39 id. 423; 2 Kent's Com. 194.

CHALMERS, J. Bettie Moore, the widowed mother of Frank Moore, a minor, brought this writ of *habeas corpus* against Thomas F. Christian, to recover possession of her son, who she alleges is illegally detained in custody by said Christian. Christian answers that the boy is at his house of his own accord; that he (Christian) exerts no sort of restraint over him; and that he is at liberty to depart whenever he chooses. The testimony develops this state of

* Compare *In re Poole* (2 McArthur, 583), 30 Am. Rep. 626.

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facts. The father and mother of the boy had been laborers on the land of Christian. The father died shortly before the suing out of the writ. Christian alleges that several years before his death he put the boy in his (Christian's) charge, saying that he might keep him until he attained majority. The mother says that she does not believe that her husband ever entered into any such agreement, and that if he did, it was without her knowledge or consent. It is certain that the boy went into Christian's charge when he was about ten years of age, and that he was about thirteen when this action was instituted. He avows his own desire to stay with Christian, stating that the latter treats him well, and has promised to give him a horse, saddle and bridle if he will remain. When the mother called for her son, before the suing out of this writ, Christian told her that he could go with her if he desired to do so, but that she should not take him against his will. She says that Christian threatened to whip her if she attempted to compel her son to go with her. This he denies.

It is shown that Christian is a man of good character, and some property. The mother is very poor and illiterate, dependent upon her daily labor in the fields for the support of herself and five children, all of whom, save one, are younger than this son.

Two questions are presented by these facts: 1. Is the mother entitled to the custody of her child? 2. Has there been established such detention of the boy, on the part of Christian, as will support this writ?

Nature gives to parents that right to the custody of their children which the law merely recognizes and enforces. It is scarcely less sacred than the right to life and liberty, and can never be denied save by showing the bad character of the parent, or some exceptional circumstances which render its enforcement inimical to the best interests of the child.

Our statute law provides for appointing guardians of the estates of minors, whether their parents are living or dead; but expressly forbids the appointment of guardians of their persons if either parent be alive, thus recognizing in the broadest manner the parental right to their custody. Code 1871, § 1202.

So, too, all officers and courts are forbidden to apprentice any minor without the consent of the parent, unless it be shown that the parent has failed or been unable to take charge of the child, or is of immoral habits. Code 1871, § 1793.

No higher evidence could be afforded of the sanctity with which

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our law invests the parental right of custody, or rather recognizes and protects the right given by nature and by God. It is, indeed, held that this parental right must give way to the permanent interest of the child, if it be shown that the life, or health, or morals of the latter will be prejudiced, or his usefulness as a citizen seriously jeopardized, by remaining under the parental control; but it is not meant by this that the courts can sit in judgment upon the question whether a wealthy stranger can give to the child more worldly advantages than an indigent parent. This would be to make poverty a crime, and to punish it by the bitterest of penalties. In the case at bar, it is not shown, or attempted to be shown, that the mother is in any respect an improper person to control and govern her own offspring. Nothing is alleged against her save her poverty and her dependent condition, and that would seem to furnish a reason rather in favor of than against her right to demand and obtain the control and the services of that one of her children who can aid her in rearing and supporting the others.

The boy, it is true, expresses a preference to remain with the appellee; but while in doubtful cases the wishes of a child of this age will be sought, and to some extent be observed, we cannot for a moment agree that a boy of thirteen can be allowed, at pleasure, to abandon his filial duties, and select elsewhere a home more agreeable either to his desires or his worldly interests. So to hold would simply be to offer a premium to the children of the poor to shirk the duties to which their station in life has called them, and to permit them, at the sacrifice of all the natural affections, to set about bettering their condition, at a period of life when the law dedicates both their persons and their services to parental control.

But it is said that in this instance the father, in his lifetime, had contracted away his son, and that as it is to the father, rather than the mother, that the law awards the custody of the children, this contract will be enforced by the courts. Conceding that there was in this case a contract, based upon a legal consideration and binding upon the father — upon which we express no opinion — it must, we think, be held to have terminated at his death. If made at all, and if a valid contract at all, it was entered into without the knowledge or consent of the mother, and could not, therefore, divest her of that right to the custody of her son which arose upon the death of the father.

The father may appoint a testamentary guardian of the person or

estate of his children, but he cannot, by contract with a stranger, bargain away the rights of the mother after his death. The courts might, under such circumstances, refuse to restore the child to her, for good and sufficient reasons, springing out of her own character and the welfare of the child; but the objections to doing so must be based upon other considerations than her poverty, or the wishes of a boy of thirteen, seduced from filial duty by promises of presents or rewards.

We are of opinion that the mother, in this case, has shown herself entitled to the custody of her son.

Has a case of detention been made out against appellee? "The writ of *habeas corpus* shall extend to all cases of illegal confinement or detention whatever, by which any person is deprived of his liberty, or in which the rightful custody of any person is withheld from the person entitled thereto." Code 1871, § 1396.

We have seen that the mother is entitled to the custody of her son in this case. Is that custody withheld from her by appellee? He says that the boy is at liberty to go if he pleases, but he admits that he has forbidden the mother to exercise her parental right of force and chastisement to compel obedience to her wishes. He who harbors a child absconding from its home, and forbids the exercise of parental authority to enforce a return, does, within the meaning of the act, withhold the child from the custody of the person entitled to it.

Indeed, the mere harboring and employing of a child under such circumstances, is made by statute a criminal offense in this State, and would of itself perhaps justify a writ of *habeas corpus*. Acts 1876, p. 32.

In *Maples v. Maples*, 49 Miss. 393, this court refused to return a child, who was living with its grandfather, to its mother, who was shown to be an immoral woman. That far the decision is approved. In so far as it held that the conduct of the grandfather in refusing to permit the mother's agent to take possession of the child did not amount to a detention, it is overruled.

Reversed and remanded, with instructions to remand the child to the custody of the mother. Appellee to pay costs in both courts.

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LOWENBURG V. JONES.

(55 Miss. 688.)

Carrier — Liability of last of a connecting line of carriers for negligence of a prior.

The last of several common carriers, forming a connecting line, cannot be held for the negligent loss of goods by a prior carrier of the same line.

ACTION for freight. The defendant claimed to offset the value of a portion of the property lost in transit. The opinion states the facts. On this point the judgment below was for the plaintiff.

T. M. Miller and M. Marshall, for plaintiffs in error.

W. L. Nugent, for defendant in error.

SMALL, Ch. J. The question on which the case seems to have turned, in the court below, was, whether the defendants could not recoup in this action the value of the mule, against the demand for freight asserted against them.

The facts are these: Lowenburg & Co. shipped at St. Louis twenty-three mules, consigned to themselves at Vicksburg, "on a through bill of lading." The animals were received by the Iron Mountain road at St. Louis, and were transported over two connecting railroads, the last being the Vicksburg and Meridian road. The agent of the latter road delivered twenty-two mules to the owners, stating that one had escaped from the car at Canton, and when found would be delivered. The delivery was made by the agent, without payment of freight, that being postponed until some inquiry and adjustment could be made in respect to the missing mule. Afterwards a mule was tendered to Lowenburg & Co., which they declined to take, because not the one that was lost. It was proved that one of Lowenburg & Co.'s mules, in consequence of the breakage of the end of the car, escaped near Canton, but not on the line of the Vicksburg and Meridian road. The Vicksburg and Meridian road held Jones, its agent, responsible for the freight-bill, and deducted its amount from his salary.

There was no proof of the terms of the contract with the first

carrier. The bill of lading, or the receipt given to the shippers, was not produced on the trial.

The contract with the Iron Mountain Railroad Company may have imposed the duty on that company to safely carry and deliver at the point of destination. If such were its terms, then that company assumed responsibility for the connecting lines, which were its agents, no matter on what line the loss happened: It may be that the terms of the affreightment were such that each carrier was only bound to carry the property safely to the terminus of its line, and then deliver to the next, and so on, until the ultimate destination was reached. If that were its character, then each is responsible for its own default or miscarriage, causing loss or damage. It is well settled that a natural person, being a common carrier, may engage to carry goods beyond the terminus of his line, and thus make connecting carriers his agents. Story on Bail., § 558; Smith's Merc. Law, 367; Pars. on Merc. Law, 217; *Perkins v. Portland, etc., R. Co.*, 47 Me. 588.

By the great weight of authority, the same principle is applicable to a railroad company.

In England, by repeated decisions, the rule has been settled that if a railroad company receives goods "marked for delivery" at a place beyond the terminus of its own line, it undertakes, *prima facie*, to transport and deliver safely at the place of destination, and would be liable for loss or damage occurring on a connecting line. The company is under its common-law responsibility as carrier, for the whole route, unless by special contract it is limited. *Muechamp v. Railway Co.*, 8 M. & W. 421; *Crouch v. Railway Co.*, 25 Eng. Law and Eq. 287. And the action must be brought against the first carrier. Authorities cited.

Under the English rule, the receiving carrier will be presumed to have made arrangements with the other lines which affect it with liability. *Watson v. Railway Co.*, 3 Eng. Law and Eq. 497; 7 Exch. 699; 16 Eng. Law and Eq. 531.

A less rigorous rule has secured the sanction of most of the American courts. The principle of the later cases is, that the bare receipt of goods marked for delivery beyond the carrier's line does not, in the absence of a special contract, impose on the receiving carrier a liability for the connecting lines. He has performed his duty by safe carriage to the end of his line and prompt delivery to the next connecting carrier, and so on, until the property has been transported

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to the place of ultimate delivery. Each carrier is under the common-law responsibility so long as he has a duty to perform as carrier.

But the usage of the business of the receiving carrier, its conduct, and dealings may be such that a contract may be implied that it takes the risk for the whole route. Para. on Merc. Law, 217, 218, note 3; 2 Para. on Con. 217, and cases cited in note.

If connecting carriers continue the transit, under a special agreement made by the first with the shipper, then each is liable to the owner of the goods, according to the agreement. *Meagher v. C. and A. R. Co.*, 44 N. Y. 520, 521. Also *Root v. Gt. West. Ry. Co.*, 45 id. 529; *Green v. Clarke*, 2 Kern. 343; *Sanderson v. Lamberton*, 6 Binn. 129; 2 Greenl. on Ev. 210, and note.

The English rule, that if a shipper makes a special contract with the first carrier to safely carry and deliver to the ultimate point, the action must be against him, and will not lie against an intermediate or connecting carrier by whose default loss ensues, has not met with judicial approval in this country. Under such a contract, the receiving carrier would undoubtedly be liable, although the fault was with the connecting carrier; so also would be the carrier on whose line the default and loss occurred.

If, by the contract, the Iron Mountain Railroad Company engaged to be responsible for the transit of the mules over the whole route, it could be held for a loss on any part of the line beyond its terminus. So the connecting carrier would be liable also, if the loss could be traced to it. *Green v. Clarke*, 12 N. Y. 346; *Dawes v. Peck*, 8 T. R. 330; *Burnett v. Lynch*, 5 B. & C. 589; *Sanderson v. Lamberton*, 6 Binn. 129; *New Jersey Steamer Co. v. Merchants' Bank*, 6 How. 344.

The English courts remit the owner to a remedy against the receiving carrier, on the idea that there is no privity of contract between the connecting carrier and the shipper or owner. The American courts sustain the action against the connecting carrier guilty of the tort, on the better reason that the shipper or owner adopts the act of the first carrier in passing the property to the second, so that the second becomes bailee of the owner. The first carrier becomes the agent of the owner in contracting with the second; and by bringing the suit against the second, the owner confirms or ratifies the act.

The shipper of property by railroad, to a place of delivery which can only be reached by transit over connecting lines, must be presumed to assent to the transfer by the first bailee to the second, and so on to the ultimate destination; and that in each transfer there is

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set up with the carrier the relation of bailee to the general owner, with the responsibilities incident to the bailment. Such is the course of business, and such is the rule of law applicable to it in this country.

Applying these principles to the case before us, it is manifest that the defendants below could not recoup the value of the lost mules against a proper demand of the Vicksburg and Meridian Railroad Company, or its assignee, of the freight. A sufficient answer to that claim is, that the Vicksburg and Meridian Railroad Company delivered to Lowenburg & Co. all the property which it received from the connecting carrier, and there was no effort to show that a loss happened by its default or negligence. The conclusion of his honor, the special judge who tried the case (without a jury), was correct on this defense.

[But the judgment was reversed on the ground that the action should have been brought by the railroad company, there being no written assignment of the demand to Jones.]

Judgment reversed and cause remanded.

HENDRICKS V. ROBINSON.

(56 Miss. 694.)

Sale — to one for another's use — promise by latter to pay.

Where goods are sold to one for the use and benefit of another, by whom they are received and used, the latter cannot be held therefor merely upon his acknowledgment of the correctness of the account and his oral promise to pay it.

ACTION for goods sold and delivered. The opinion states the facts. The plaintiff had judgment below.

Jenkins & Little, for plaintiff in error.

T. J. & F. A. R. Wharton, for defendants in error.

1. The first instruction given for the defendants in error, in the trial below, is correct. *Planters' Bank v. Markham*, 6 Miss. 397; *Jones v. Fales*, 4 Mass. 251; 1 Pet. 33; *Mills v. Bank of United States*, 11 Wheat. 431; *Effinger v. Henderson*, 33 Miss. 449.

Hendricks v. Robinson.

CHALMERS, J. Robinson & Stevens sold goods, during the year, which were delivered to Hendricks, but which were charged to one Dulaney, who verbally became responsible for them before sale, and upon whose credit the account was opened. They instituted suit for the recovery of their value against Dulaney, but were defeated, upon the ground that he was a mere surety or guarantor, and his undertaking, being verbal, was void. They now bring this action against Hendricks, the party for whose benefit the account was opened, and who received and used the goods. It is evident that he is in no manner affected by the result of the litigation between plaintiffs and Dulaney, and his rights are to be determined without regard to that suit. The only questions to be considered are, whether he was originally bound for the goods, or has subsequently become so by any act or promise of his own. John W. Robinson, the senior member of the firm of Robinson & Stevens, testified that "the goods were sold to Hendricks upon the sole credit of Dulaney, and were charged to Dulaney on the books of the firm; that at the trial of the said case of plaintiffs against Dulaney on said account, in the Circuit Court of Madison county, witness was also a witness for plaintiffs in that case, and as such, there and then testified that he never regarded Hendricks as liable on said account, and that Hendricks was not so held liable for the payment of the same, but that plaintiffs gave credit solely to Dulaney, and looked alone to him for payment."

It seems needless to remark, that under these circumstances, there was no original indebtedness from Hendricks to plaintiffs. It was just as if a man of wealth, meeting a beggar in the street, should step with him into a shop-keeper's and present him with a suit of clothes, which, by directions, are charged to the donor. There would, in such case, be no debt due the merchant from the recipient of the charity. The testimony of plaintiffs makes out a clear case of liability upon the part of Dulaney, but however much they may have been wronged in their litigation with him, they cannot urge the result of that suit as a reason why they should be allowed to recover in this. But before the institution of this suit, the account was presented to Hendricks, who acknowledged its correctness and promised to pay it. Does this make him liable? It was so ruled by the learned judge below, but we are unable to see upon what sound principle. If it was wholly and solely the debt of Dulaney, as plaintiffs testify that it was, Hendricks could not bind himself by parol to pay it, except through an arrangement by which, on a sufficient con-

sideration, he became substituted for Dulaney, and the latter was discharged; and there is no pretense of any such arrangement having been made. The legal question involved in this class of cases has usually arisen in suits where some person other than he who received the goods denied liability for them, nor have we found a case where the defense was so made by him who received and used them; but we cannot see that this affects the principle.

The parol promise of the beneficiary to pay the debt of him who, by his credit, has procured the goods, is as invalid as a like promise by the surety where the primary obligation rests upon the beneficiary. The object and intent of the statute is to deny the imposition of a liability by parol upon two persons to pay the debt of one. Whenever, therefore, there is a primary liability upon one, there can be no secondary liability fastened upon the other save by writing, and it is wholly immaterial whether the person sought to be charged is he who got the benefit of the contract or he who procured it to be made for the benefit of another.

Neither can the validity of Hendrick's parol promise to pay for the goods be sustained upon the idea that having used them there rested upon him such moral obligation to pay for them as will support his contract. Whatever may have been the earlier ideas on this subject it is now well settled that a purely moral obligation will not ordinarily support an executory contract. There must be a legal obligation which is either enforceable or which only fails to be so because of the existence of some exceptional circumstances which operate to suspend enforcement. The doctrine is thus stated in 3 Bos. & Pul. 249: "An express promise can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise had it not been suspended by some positive rule of law, but it can give no original right of action if the obligation on which it was founded never could have been enforced at law, though not barred by any legal maxim or statute provision." To this effect are all the well-considered modern cases both in England and America. Pars. on Con. (5th ed.) 432 *et seq.*, and cases cited in notes; *Porterfield v. Butler*, 47 Miss. 165; S. C., 12 Am. Rep. 329.

The case of *Franklin v. Bentley*, 27 Miss. 330, which held that the invalid contract of a married woman would impose such moral obligation as would support a subsequent valid promise to pay is virtually overruled by the later case of *Porterfield v. Butler*, *supra*. The first

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case was rested upon the case of *Lee v. Muggeridge*, 5 Taunt. 36, which has been repeatedly repudiated both in England and America.

1 Para. on Con. *supra*.

There being no legal obligation upon defendant in the case at bar to pay for the goods, the fact that they had been bought for and used by him does not afford such moral obligation as will support his parol promise to pay for them.

The instructions of the court below were not in accordance with the views announced and were erroneous. The instruction with reference to the statute of limitations was correct.

Judgment reversed and cause remanded.

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(33 Miss. 703.)

Pardon—federal—effect on right to vote in State.

A pardon by the President of the United States of one convicted of embezzlement, in a Federal court, restores the offender to his right as a voter in the State.

MANDAMUS to compel the registry of the plaintiff in error as a voter in the State of Mississippi. He had been convicted in the Federal court of embezzlement, but pardoned by the President before his term of imprisonment expired. The application was denied below.

Reynolds & Reynolds and M. Green, for plaintiff in error.

T. C. Catchings, Attorney-General, for defendant in error.

1. The offense of which Jones was convicted was an infamous crime within the Constitution. Art. 4, § 17; Code, 1871, § 2855; Bouv. L. Dic., tit. "Infamy;" *Jones v. Harris*, 1 Strobb. 160. The conviction of an infamous crime under the laws of another State, or of the United States, stands on the same footing as conviction under the law of this State. *State v. Candler*, 3 Hawks, 393; *Chase v. Blodgett*, 10 N. H. 22; *Clarke v. Hall*, 2 Har. & McH. 372; *Jones v. Harris*, 1 Strobb. 160. The pardon did not restore

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the right to vote, of which Jones was deprived by our Constitution because of his conviction. As to this matter each State establishes its own regulations, subject to the fifteenth amendment to the Constitution of the United States. Cooley's Const. Lim. 599. The restriction on the petitioner's right to vote became fixed by his conviction, and was not removed by the pardon, the effect of which was to restore him to the rights and privileges of a citizen of the United States, but not to political rights, without the assent of the State whose sovereign power had excluded him therefrom. *Ridley v. Sherbrook*, 3 Coldw. 576. The President cannot control the State in its regulations of the elective franchise. The provision of the State Constitution on this subject is the lawful exercise of the State's authority to prescribe the qualifications of voters, and the rule cannot be changed or modified without the State's assent. Notwithstanding the pardon, the fact of conviction remains, which places the petitioner under the constitutional anathema. The pardon obliterated his guilt, but did not wipe out the thing which disqualified him for voting. *In re Spenser*, 7 Cent. L. J. 84. The disqualification is not part of the penalty prescribed for the punishment of the crime, but it results from the fact that he is not, in the estimation of the law, a fit person to exercise the elective franchise.

CAMPBELL, J. The doctrine of the authorities is, that "a pardon reaches both the punishment prescribed for the offense and the guilt of the offender," and that "it releases the punishment and blots out of existence the guilt, so that in the eye of the law, the offender is as innocent as if he had never committed the offense." "If granted after conviction, it removes the penalties and disabilities, and restores him (the convict) to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity." *Ex parte Garland*, 4 Wall. 333, 380; *U. S. v. Padelford*, 9 id. 531; *U. S. v. Klein*, 13 id. 128; *Carlisle v. U. S.*, 16 id. 147; *Knote v. U. S.*, 95 U. S. 149. In the case last cited, it is said that "a pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within the control of the pardoning power, or of officers under its direction." "In contemplation of law, it so far blots out the offense, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights." "A pardon of treason or felony, even after an attainder, so far clears the party from the infamy, and all other consequences thereof,

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that he may have an action against any who shall afterwards call him traitor or felon; for the pardon makes him, as it were, a new man." Bac. Abr., tit., "Pardon," H. "There is only this limitation to its operation; it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment." *Id.*

The Constitution of this State provides for excluding from suffrage persons convicted of "high crimes or misdemeanors." Art. 4, § 17; art. 7, § 2; art. 12, § 2. The Governor is authorized to pardon in all criminal cases, except in those of treason and impeachment. Const., art. 5, § 10.

To determine the effect of a pardon, reference must be had to the established doctrine on that subject. As already stated, the American and English authorities are univocal on this subject, and ascribe to a full pardon the magical effect of so absolving guilt as that it cannot be imputed to the person thus freed from all the consequences of conviction, so far as the pardoning power can exert control. It must be assumed that it was the intent of the Constitution, in conferring on the Governor the power to pardon all crimes, except treason, etc., to allow the full effect to such pardon, according to the established doctrine on the subject, and to embrace in the power to pardon, the "high crimes and misdemeanors," conviction of which was to exclude from suffrage. The provisions for exclusion from suffrage for crime, and for pardon of all crimes, except, etc., by the act of the Governor, being parts of the same instrument, qualify each other. A pardon by the Governor is an act of sovereign grace, proceeding from the same source which makes conviction of crime a ground of exclusion from suffrage. The act of absolution is of as high derivation and character as the act of proscription. The pardon must be held to rehabilitate the person in all his rights as a citizen, and to deny to any officer of the State the right to impute to him the fact of his conviction. After the pardon, he is as if he was never convicted. It shall never be said of him that he was convicted. The pardon obliterates the fact of conviction, and makes it as if it never was.

We have spoken of a pardon by the Governor, because our Constitution relates to that. The case before us involves a pardon by the President of the United States, of a person convicted under the laws of the United States. The same effect must be given to such pardon as to a pardon by the Governor, of one convicted under the law of

the State. And if conviction under the laws of the United States will exclude from suffrage under our Constitution, a pardon by the President must absolve from guilt, and free from all the consequences of conviction, in the same manner and to as full extent as would a pardon granted by the Governor to one convicted under the law of the State.

The view opposite to the foregoing is, that the intent of the Constitution is to exclude from suffrage a class of persons deemed unfit to be allowed to exercise this privilege, and that their unfitness is evidenced by the fact of conviction of crimes or misdemeanors; and that as a pardon does not destroy the fact of their conviction, they are excluded because of their unfitness, thus evidenced. We reject this view; because its adoption requires the assumption that the grant of the power to pardon, as contained in the Constitution, is of less force than those provisions which contemplate the exclusion of certain persons from suffrage. Our view is, that the grant of the power to pardon embraced all the effects of a pardon, when granted; and that the object of conferring this beneficent power was, that its exercise might effect all those consequences which were understood to flow from such act of grace authorized by the sovereign towards the citizen.

If the true intent of the Constitution were doubtful, and policy were allowed to exert influence in resolving the doubt, our conclusion would be the same. It would be a subject of regret if there were no means of absolution by which the citizen could be restored to his rights. A man may be convicted wrongfully. Good men sometimes commit crimes or misdemeanors. Provocation and passion are liable to occur to all, and under their sway the best citizen might subject himself to conviction for what the law denominates a crime or misdemeanor. His guilt may be technical. There may be much to extenuate his act in obedience to the promptings of passion, under severe trial from provocation. He may have universal sympathy from his fellow-citizens, who have known how well he discharged his duties in life, and who make large allowance for his act, but the law demands and secures his conviction. The Governor may pardon, but henceforth this citizen is excluded from suffrage, while thousands less worthy are allowed to exercise the right of suffrage, simply because it may be that justice has not overtaken them.

A frame of government which tolerated such a result would be seriously defective. Fortunately, ours has made provision for an act

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of sovereign grace as efficient in its work of mercy as other provisions are for meeting the demands of justice. The plaintiff in error was entitled to be registered as an elector.

Judgment reversed.

RODGERS v. KLINE.

(56 Miss. 808.)

Slander and libel — "malpractice" — physician.

To charge a physician with "malpractice" in a particular case is not conclusively libelous in itself, if untrue, but it is for the jury to determine whether the word was used in a general and actionable sense.

ACTION of libel. The opinion states the facts. The plaintiff had judgment below.

L. W. Magruder and Miller & Hirsh, for plaintiff in error.

A. B. Pittman, for defendant in error.

1. Whether words whose meaning and application are ascertained are actionable *per se*, is a question of law, and not of fact; and is to be determined by the court, and not by the jury. See authorities cited on next point.

2. Words spoken of another, touching his trade, calling or profession, whose necessary tendency is injurious to him in his particular trade, calling or profession, are always actionable *per se*. Words which are not so on their face, become so by proper averment and proof. Town. on Slander, §§ 181, 182; *Sewall v. Catlin*, 3 Wend. 291; *Mott v. Comstock*, 7 Cow. 654; *Ostrom v. Calkins*, 5 Wend. 263; *Elri v. Ferris*, Anth. 23; *Kinney v. Nash*, 3 N. Y. 177; *Prettyman v. Shockley*, 4 Harr. 112; *Barnes v. Trundy*, 31 Me. 321. "Malpractice" involves ignorance, negligence, unskillfulness or moral turpitude, in such degrees as are inconsistent with the character of a trustworthy physician. This is both the popular and legal meaning, when applied to a physician. It is not true that malpractice may be predicated of every mistake of a learned, skillful and attentive physician. A physician guilty of malpractice is necessarily guilty of

such ignorance, or of such unskillfulness, or of such negligence, as is regarded as culpable and immoral, and renders him liable to a civil or criminal prosecution. The mistakes which are attributable to the imperfections of humanity are not due to departures from established rules and methods of the profession, not inconsistent with learning, integrity, fidelity and diligence, and are not understood as constituting malpractice, either in common parlance or according to the meaning of the term as used in law-books.

GEORGE, Ch. J. The language alleged to be libelous is as follows: "The accident of Miss Chisholm's death, caused by malpractice, and not by her slight wound, adds ten-fold to the deplorable consequences."

This simple sentence is found in an article of a column in length, published in the *Vicksburg Herald* in May, 1877. The article is headed, "Rash Southerners and Philanthropic Northerners," and contains but one other reference to Miss Chisholm's death, in which it is stated to have been "accidental, from gangrene." It is clear, from a perusal of the whole article, that it was no part of the object and purpose of the writer to criticise the treatment, medical or otherwise, which she received in her last illness. No mention is made of the name of any person concerned in the treatment, nor any allusion made to the fact that she had a medical attendant, unless such allusion is made in the language above quoted. The manifest object and purpose of the article, as well as its full scope, was to soften the unfavorable effect produced in the public mind by the transaction then known as the "Chisholm massacre," which had been greatly intensified by the death of Miss Chisholm, resulting from the effects of a gunshot wound alleged to have been inflicted by the rioters. To this end, the article alludes to the rash and excitable nature of the Southern people in their condemnation and punishment of great crimes which appear to have been deliberately planned and executed.

The writer, whilst condemning the proceedings of the mob, states, as some palliation for its unlawful action, the belief of the people of Kemper county that its intended and premeditated victims were the deliberate murderers of a highly esteemed citizen of that county, and ascribes the death of Miss Chisholm to accident, and not to the deliberate purpose of the actors in the riot; suggesting as a fact, in the language above quoted, that it was caused by malpractice, resulting in gangrene. It is clear, therefore, that the writer had no

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wish to reflect upon the plaintiff's professional standing, or to bring him into disrepute.

But the absence of this intent or purpose does not, *per se*, exonerate the publishers of the article from responsibility, if in fact such language was used in it as would inflict an illegal injury on the plaintiff; for the injury to him would be all the same whether it was the result of design on the part of the defendants, or of their carelessness and negligence.

There is no exception taken to the ruling of the court below which holds that the language used is legally capable of such application to the plaintiff as to constitute a libel on him, and we are not, therefore, called on to express any opinion on that subject.

The assignments of error raise several other questions for our determination, which we will now proceed to consider. The court charged the jury, in the third instruction for the plaintiff, that if it were established that the plaintiff was the attending physician on Miss Chisholm, and the defendants published the language above quoted, it was actionable, or constituted a libel on the plaintiff, if not justified by proof of its truth.

The force of the alleged libel seems to consist in the use of the word "malpractice." In its technical sense, as applied to prosecutions, either civil or criminal, against a physician for unskillful treatment of a patient under his charge, it would be actionable. But there is nothing in the article of which this language is a part, which suggests that the word was used in a technical, rather than a popular, sense. On the contrary, it is clear, from a consideration of the whole article and its nature and character, that it was not used in its technical sense; for it is an undoubted rule, that in writings intended for popular reading, and having no relation to any art or profession, a word which does not itself import that it is used in a technical sense is to have its popular signification. *Monongahela Nav. Co. v. Coons*, 6 W. & S. 114.

It was therefore error for the court to give this charge, unless the word "malpractice," in its ordinary signification, has but one meaning, and that meaning is libelous; or unless a libelous signification is necessarily affixed to it by the context. We have seen that there was nothing in the context, nothing in the scope and purpose of the article, to give it a libelous meaning; but rather, if the context is to be considered as fixing beyond controversy its meaning, the contrary sense would be implied. Neither has the word "malpractice,"

in its ordinary acceptation, necessarily a libelous meaning. It has several meanings; one of them, implying illegal or immoral conduct, is libelous; and the others—bad or evil practice, practice which is not good, practice which is contrary to established rules—are not libelous.

When the language used is ambiguous, or a word has two distinct meanings, the sense in which it is used in the alleged libel must be determined by the jury and not by the court. In performing this duty the jury are to consider all the circumstances of the case, the various ordinary and popular meanings of the word, the connection in which it is used, and also the object and purpose of the author in the writing in which it is found, so far as that object and purpose may be developed to the reader by a perusal of the whole article.

The seventh and eighth charges given at the instance of the plaintiff are also erroneous, for the reason that in them the court construed the meaning of the word "malpractice," instead of leaving its meaning to be ascertained by the jury. These charges assume that the word "malpractice" meant gross ignorance and unskillfulness, which is only one of its ordinary meanings.

It is settled that words spoken or written of one in his special character, as the occupant of an office or the follower of any profession or trade from which he derives pecuniary gain, though generally not actionable, become so if they impute to such person such ignorance or incapacity as unfits him for the proper exercise of his calling. Town. on Slander, § 194. But it is also settled that it is not actionable to charge such a person with want of skill, or ignorance or neglect, in a particular transaction done in his special character, unless the charge be of such gross want of skill or ignorance as would imply a general unfitness for his calling.

In *Camp v. Martin*, 23 Conn. 56, the slanderous words spoken of a physician were: "If Dr. C. (the plaintiff) had continued to treat Sarah she would have been in her grave before this time; his treatment of her was rascally."

After verdict the defendant moved in arrest of judgment on the ground that the words were not actionable and the court said: "To charge a physician merely with mismanagement of a particular case is not, of itself, actionable. Such a charge implies nothing more than ignorance or unskillfulness in that case, and does not materially affect his reputation as it respects his general competency to practice his profession. The most eminent physician may mistake the symp-

Rodgers v. Kline.

toms or treatment of a particular case without detracting from his professional skill and learning," and the court sustained the motion to arrest the judgment.

To charge a professional man with neglect or unskillfulness in the management or treatment of a particular case is no more than to impute to him the mistakes and errors incident to fallible human nature ; and as no man can rightfully claim infallibility the imputation of the contrary can work no legal damage or injury to him however much it may wound his vanity or offend his sensibilities. But as the word "malpractice," in its ordinary and popular use, may mean illegal and immoral conduct, and may therefore impute such gross ignorance and unskillfulness as unfits the party for his employment, it should have been submitted to the jury to determine the sense in which it was used.

[Omitting other matters.]

Judgment reversed. New trial granted and cause remanded.

CASES
IN THE
SUPREME COURT
OF
NEBRASKA.

STATE SAVINGS BANK V. SHAFER.

(9 Feb. 1.)

Negotiable instrument — alteration — recovery on original consideration.

The payee of a note, honestly supposing he had the right to do so, altered the note by reducing its amount, and then transferred it to a *bona fide* purchaser. *Held*, that there could be no recovery on the note, but the holder might recover on its original consideration.*

ACTION on a promissory note. The opinion states the facts. The defendants had judgment below.

Clarence Gillespie and E. W. Thomas, for plaintiff in error.

A. R. Scott, for defendants in error, cited 2 Dan. on Neg. Inst. 376; *Hewins v. Cargill*, 67 Me. 554; *Wait v. Pomeroy*, 20 Mich. 428; *S. C.*, 4 Am. Rep. 395; *Fay v. Smith*, 1 Allen, 477; *Lewis v. Schenck*, 18 N. J. Eq. 459.

MAXWELL, Ch. J. The defendants are the makers of a promissory note, of which the following is a copy:

"\$217.36.

FALLS CITY, NEB., Sept. 5, 1877.

"Ninety days after date, we, or either of us, promise to pay C. L. Keim or order two hundred and seventeen and thirty-six one-hun-

* To same effect, *Hunt v. Gray* (35 N. J. 227), 10 Am. Rep. 232.

State Savings Bank v. Shaffer.

dredths dollars for value received, negotiable and payable without defalcation or discount, and interest from maturity until paid at the rate of twelve per cent per annum, and ten per cent attorney's fee if collected by suit. Payable at the Falls City Bank, Falls City, Nebraska.

"FRANCIS SHAFFER.

"ELIAS S. MYERS."

The note was delivered to Keim, who, before the maturity thereof, without the consent of the makers, changed the amount of the note from \$217.36 to \$208.12, and transferred the same by indorsement to the plaintiff, who brought an action on the note in the District Court of Richardson county. On the trial of the cause the court excluded the note as evidence, and refused to permit an amendment of the petition setting up the original consideration of the note. Judgment having been rendered in favor of the defendants, the plaintiff brings the cause into this court by petition in error.

In *Brown v. Straw*, 6 Neb. 536; *S. C.*, 29 Am. Rep. 369, this court held that the alteration of a promissory note in any material part renders it invalid as against a party not consenting thereto, even in the hands of an innocent purchaser. The reason is, that the agreement is not the one into which the defendant entered; its identity is changed and another is substituted without his consent. And the policy of the law is to permit no tampering with written instruments. The note therefore having been changed in a material part, without the consent of the makers, is void in whosoever hands it may afterwards be placed. The court therefore did not err in excluding the note as evidence.

Where, however, an alteration is made under an honest mistake of right, and not fraudulently and with a view to gain an improper advantage, a recovery may be had upon the original consideration of the note.

In *Merrick v. Bowry*, 4 Ohio St. 60, the Supreme Court of Ohio held that a recovery upon the original consideration could be had in such cases, and the reasoning of the court, after reviewing the authorities, appears to be unanswerable. To the same effect, see, also, *Matteson v. Ellsworth*, 33 Wis. 488; *S. C.*, 14 Am. Rep. 766.

[Omitting questions of practice.]

Judgment reversed and cause remanded.

BRAHMSTADT v. MCWHIRTER.

(9 Neb. 6.)

Assignment for benefit of creditors — authority to sell on credit.

An assignment for the benefit of creditors authorizing the assignee to "sell and dispose of the property and generally convert the same into money, upon such terms and conditions as in his judgment may appear just and for the interest of all parties interested," is not void upon its face. (*See note, p. 398.*)

ATTACHMENT. The opinion states the facts.

France & Sedgwick, for plaintiffs in error.

Scott & Giffen, for defendant in error, cited 2 Pars. on Cont. 505 *Hutchinson v. Lord*, 1 Wis. 286; *Schufeldt v. Abernethy*, 2 Duer, 533. The assignment in this case clearly gives an authority to sell on credit, for it gives the assignee the same powers of disposition over the property as the assignors. A sale is either for cash or upon credit, and the terms of a sale mean the space of time granted the debtor to discharging his obligation; and in conveyances, the time of paying the consideration. *Leroy v. Beard*, 8 How. 451; *Hutchinson v. Lord*, 1 Wis. 286; Bouv. Dict., title, "Terms."

MAXWELL, Ch. J. The plaintiffs were a firm doing business at York, in this State, and being unable to pay their debts in full, made an assignment for the benefit of their creditors to Frederick W. Liedtke, clerk of the District Court of York county. The defendant, who was a creditor of the plaintiffs, commenced an action against them by attachment, in the County Court of York county. The County Court sustained the attachment, which judgment was affirmed by the District Court. The plaintiffs bring the cause into this court by petition in error.

But two questions are involved in the case: First. Is the assignment void on its face as to creditors? Second. Can the clerk of a District Court act as assignee?

The deed of assignment recites that: "Whereas the said copartnership is justly indebted in sundry considerable sums of money, and has become unable to pay and discharge the same with punctu-

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ality or in full, and the said parties being desirous of making a fair and equitable distribution of all their property and effects among their creditors, now, therefore," etc. The assignment also contains this provision: "The said party of the second part (the assignee) shall take possession of all and singular the lands, tenements, and hereditaments, property, judgments, and effects hereby assigned, and sell and dispose of the same, and generally convert the same into money upon such terms and conditions as in his judgment may appear just and for the interest of all parties concerned."

It is claimed that this provision renders the instrument void on its face. It will be perceived that the authority is to convert the property into *money*, not to sell upon credit. The words "terms and conditions," taken by themselves, might imply an authority to sell on credit, but construing the entire instrument, it is clear that no such power was intended.

In *McCleery v. Allen*, 7 Neb. 22; S. C., 29 Am. Rep. 377, the assignment, after providing for a sale for cash, contained these words: "And to dispose of the same in any manner whatsoever as freely and lawfully as the assignor could do himself, which the said party of the second part, trustee as aforesaid, may deem advisable to do, tending in his opinion to convert the same into money for the benefit of all interested." It was held that this was authority not only to sell on credit, but to exchange the property assigned for notes, bonds, mortgages, or other forms of indebtedness, and the assignment was held to be void on its face. And we adhere to that decision. The reason is, the terms of an assignment cannot extend the time of credit between debtor and creditor. The creditor whose debt is due cannot be compelled by the terms of the assignment to wait until such time as the trustee sees fit before the property is applied to the payment of his debt. And if by its terms such power is given, the instrument will be void upon its face as tending to "hinder and delay" creditors. That the property cannot be applied at once to the payment of the debts will not invalidate the instrument, if the delay is such as necessarily results from a reasonable exercise of the power given to the trustee, and is not the result of the conditions of the instrument.

In *Keep v. Sanderson*, 2 Wis. 42, and S. C., 12 id. 391, it was held that a provision similar to the one cited above was authority to sell on credit, and it was void as to creditors.

Those cases were cited in the case of *McCleery v. Allen*, 7. Neb.

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24; *S. C.*, 29 Am. Rep. 377, not as an indorsement of the doctrine, but to show the extent to which the courts of the several States had gone in holding an assignment void on its face. Such words, in our opinion, do not necessarily give the trustee the power to sell on credit, and an assignment for the benefit of all the creditors of a debtor will not be declared void on its face, unless it is clearly so.

In the vicissitudes of business, when a debtor finds that he is unable to pay all his debts and makes an assignment for the benefit of all his creditors, all that the law requires is a faithful application of the property to the payment of the debts without unreasonable delay.

As to the objection that the assignee being clerk of the District Court, and could not therefore approve his own bond, it is at most a mere irregularity, and does not render the assignment void on its face. The bond is sufficient in form and amount and is signed by a large number of persons as sureties, and there is no objection made that it is not sufficient. And the trustee may at any time, when thought necessary, be required to give an additional bond.

So far as appears, the trustee was endeavoring faithfully to carry out the trust at the time the action was instituted, and being for the benefit of all the creditors of the assignors the assignment is favored in law. The judgment of the District Court is reversed and the cause dismissed.

Judgment accordingly.

NOTE BY THE REPORTER.—In *Brigham v. Tillinghast*, 3 Kern. 215, an authority to convert the property "into money or available means" was held void.

In *Kellogg v. Slawson*, 11 N. Y. 302, the direction was "to sell and dispose of the same upon such terms and conditions as in their judgment may appear best and most for the interest of the parties concerned, and convert the same into money." *Held*, valid.

In *Jessup v. Hulse*, 21 N. Y. 168, a direction to dispose of the property at such time and in such manner "as may be most conducive to the interests of the creditors," and "convert the same into money as soon as may be consistent with such interests," was held valid.

A provision that the trust property be "converted into cash or otherwise disposed of to the best advantage" by the assignee, held, invalid, as authorizing a sale on credit. *Expain v. Stewart*, 27 N. Y. 310.

An authority to "within such convenient time as to him might seem meet, by public or private sale, for the best price that can be procured, convert" the property into money, was held valid in *Benedict v. Huntington*, 32 N. Y. 219; overruling *Woodburn v. Mosher*, 9 Barb. 255, and *Murphy v. Bell*, 8 How. Pr. 468.

In *Townsend v. Stearns*, 32 N. Y. 209, a direction to "convert into money with all convenient speed," and "to sell and dispose of the assigned premises, at such time or times, and in such manner, as to him may seem to be most for the benefit and advantage of the creditors," held, valid.

In *Hutchinson v. Lord*, 1 Wis. 236, a direction to sell "upon such terms and for such prices as to him should seem advisable," was held invalid; and in *Kepp v. Sanderson*, 2 id. 42, a provision exactly like that in *Kellogg v. Slawson*, *supra*, was held invalid. But in *Norton v. Kearney*, 10 id. 450, a direction to dispose of the property to the best advantage in his discretion, was held valid, as implying a lawful discretion.

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In *Murray v. Noyes*, 26 Vt. 462, a direction to convert into money "as soon as practicable and in the most beneficial manner," was held valid.

In *Neally v. Ambrose*, 21 Pick. 185, a direction to reduce to cash by selling at public or private sale in such manner, and at such times, as the trustees might consider expedient and most for the interest of all parties, was held to authorize a sale on credit.

In *Mackey v. Saunders*, 6 Iowa, 68, a direction "to take such steps for the sale and disposal of them as he may deem proper," was held valid. The court say: "No express power or direction has been given to the assignee to sell on credit; and no intent to hinder and delay creditors can justly be inferred from the authority given" as above. So held also in *Berry v. Hayden*, 7 Id. 469, where the direction was to sell and dispose of the same upon such terms and conditions as in his judgment may appear best.

In *McCallie v. Walton*, 37 Ga. 611, a direction to convert into money and for that purpose to sell in such manner and on such terms as they deem most for the interest of the trust, was upheld. The court said: "We do not perceive how the end to be accomplished, the conversion of the property into money, for distribution among the creditors of the company, could have been well and beneficially accomplished without such a fair and rational discretion as was conferred on the assignees."

In *Booth v. McNair*, 14 Mich. 19, a direction to "sell and dispose of the same for money, upon such terms and conditions as in their judgment may appear best and most for the interest of the parties concerned," was held not to authorize a sale on credit.

In *Nye v. Van Husean*, 6 Id. 329, a direction to sell and dispose "either at public or private sale, as they in their judgment may deem best, and upon such terms and conditions as they may deem most advisable and for the best interests of the creditors, converting the same into money," was held not to authorize a sale on credit.

Burrill says (Assignments, § 224): "It may be stated as the general rule, that an authority to sell on credit will not be implied adversely to the assignment, from language susceptible of a different construction which will support the instrument."

MAY V. MAY.

(9 Neb. 16.)

Marriage — suit by wife against husband on note executed to her during coverture.

Under a statute which enables married women to acquire, hold and deal with property and to sue and be sued in the same manner as if unmarried, and relieves all such property except such as comes by gift from their husbands from liability to the disposal of their husbands or for their debts, a married woman may maintain an action against her husband on a note given directly to her by him for a valuable consideration during coverture.

ACTION on promissory notes. The opinion sufficiently states the case. The defendant had judgment below.

Schoenheit & Thomas, for plaintiff in error.

J. D. Gilman, for defendant in error. Notwithstanding the statute enlarging the right of the wife the rights of the wife are enlarged only as to third parties, and the relationship between husband and

wife is not affected or disturbed. *Aultman v. Obermeyer*, 6 Neb. 261; *Fowler v. Trebein*, 16 Ohio St. 498; *Wallingsford v. Allen*, 10 Pet. 583; Reeves' Dom. Rel. 89; *Jackson v. Parke*, 10 Cush. 550. Plaintiff must seek her remedy in a court of equity. *Lamaster v. Scofield*, 5 Neb. 148; *Turner v. Althaus*, 6 id. 54.

COBB, J. Although there is but one practical question presented by the record in this case, yet it will perhaps be found more convenient, for the purpose of its proper consideration, to divide it into two at the outset.

First. Does the making and delivery of a promissory note by a married man to his wife for a valuable consideration constitute a valid and binding contract?

Second. Can a married woman while living with her husband maintain an action against him on a promissory note made and delivered by him to her since the marriage?

It will be readily conceded that unless we find authority for an affirmative answer to these questions in our statutes they must both be answered in the negative. The sections of our statute applicable to the first branch of our inquiry are as follows:

"SECTION 1. The property, real and personal, which any woman in this State may own at the time of her marriage, and the rents, issues, profits or proceeds thereof, and any real, personal or mixed property which shall come to her by descent, devise or bequest, or the gift of any person except her husband, or she shall acquire by purchase or otherwise, shall remain her sole and separate property, notwithstanding her marriage, and not be subject to the disposal of her husband or liable for his debts. [Laws 1875, p. 88.]

§ 2. A married women, while the marriage relation exists, may bargain, sell and convey her real and personal property, and enter into any contract in reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation to his real and personal property.

§ 3. A woman may, while married, sue and be sued in the same manner as if she were unmarried.

§ 4. Any married woman may carry on trade or business and perform any labor or service on her sole and separate account; and the earnings of any married woman from her trade, business, labor or services shall be her sole and separate property, and may be used and invested by her in her own name." [Gen. Stat. 465.]

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This statute defining the rights of married women contains but one allusion to, or exception of, her husband. Property, the gift of her husband, may not remain her sole and separate property, not subject to the disposal of her husband or liable for his debts. In respect to property acquired by her in any other manner than by gift from him, the husband stands in the same relation to her as all the rest of the world. In the grant of general power (if I may use the language) to her to "bargain, sell and convey her real and personal property, and enter into any contract in reference to it," to "sue and be sued," to "carry on trade or business and perform any labor or service on her sole and separate account," and to use and invest her earnings in her own name, contracts with her husband are not excepted.

The provisions of the statute of Maine on this subject are as follows:

"SECTION 1. A married woman of any age may own in her own right real and personal estate acquired by descent, gift or purchase; and may manage, sell, convey and devise the same by will, without the joinder or assent of her husband; but real estate directly or indirectly conveyed to her by her husband, or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband in such conveyance, except real estate conveyed to her as security or in payment of a *bona fide* debt actually due from her to her husband. When payment was made for property conveyed to her from the property of her husband, or it was conveyed by him to her without a valuable consideration made therefor, it may be taken as the property of her husband to pay his debts contracted before such purchase.

"§ 2. A woman having property is not deprived of any part of it by her marriage, since the act approved March 22, 1844, was in force; and a husband by marriage, since that time, acquires no right to any property of his wife. * * * A married woman may release to her husband the right to control her property, or any part of it, and to dispose of the income thereof for their mutual benefit, and may in writing revoke the same.

"§ 3. She may receive the wages of her personal labor not performed for her own family, maintain action therefor in her own name, and hold them in her own right against her husband or any other person." [Revised Statutes of Maine, 1871, p. 491.]

Under this statute the case of *Webster v. Webster*, 56 Maine, 139;

S. C., 4 Am. Rep. 253, was commenced and decided; that was an action on a note made and delivered by the defendant to the plaintiff January 22, 1861 (the above statute being then in force), and they being then married (at the date of the note) and living together as husband and wife. At the October term 1869, they were divorced *a vinculo*. Afterwards she brought the suit on the said note, and had judgment at the Superior Court. On error to the Supreme Court it was held that while for purely technical reasons she could not have maintained the suit until after the divorce or the termination of the marriage relation in some other way, yet that the giving of the note created a valid contract between the parties, and that the defense of marriage (which was urged and relied upon by plaintiff in error) was purely technical. It continues only while that relation continues, and ceases with its termination. The judgment was affirmed.

The statute of Kansas in relation to the rights of married women is identical with our own. Under its provisions the Supreme Court of that State has held, in a case where a married woman, living with her husband, bought a horse from him, and paid him for it out of her separate money — how or when acquired by her is not stated — which horse was soon afterwards levied upon by a constable by virtue of an execution against the husband, that she could maintain replevin against the constable for the horse. Thus necessarily holding that the husband and wife, while living together in that relation, were competent to make legal and binding contracts with each other, so as to pass the title of property *ex vi termini*. *Going v. Orns*, 8 Kans. 85, which case has been followed by later cases in that State.

In the State of Iowa, under a statute somewhat different from ours, though not different in principle, it was held in a case where, during the marriage relation, the husband borrowed money from his wife and gave her his note for it, that the same was a valid and binding contract, and that he being deceased she could maintain suit thereon against his administrator. *Logan v. Hall*, 19 Iowa, 491.

As long ago as 1841 it was held, by the Supreme Court of Ohio, that a note given by a husband to his wife for a loan of money by her to him, out of a dower interest received by her from the estate of a former husband, created a legal obligation which — the maker of the note having deceased — would be enforced against his administrator. *Huber v. Huber's Administrator*, 10 Ohio, 371, which case was followed in 1857 in *Wood v. Warden*, 20 id. 518.

In none of the above-mentioned States has the legislature passed

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any act which in terms changes the common law in regard to the nature and character of the marriage relation, or the unity of the persons of husband and wife, and the above cases must, of necessity, have gone upon the theory that the statutes of the said States respectively defining the rights of women in the marriage relation in respect to the ownership, control and disposition of property, have, in effect, done away with the technical unity of husband and wife as formerly existing at common law. At least such is my opinion. So that when our statute says that "a married woman, while the marriage relation exists, may bargain, sell and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may," etc., it means that she may sell the same to, or contract with reference to the same with, anybody who is generally competent to contract, and that the other contracting party will be bound by such contract regardless of whatever relations may exist between them.

I come, therefore, to the conclusion that the plaintiff in error was competent to receive the said note set forth in the first cause of action set out in the petition from the said Josiah Kocken, and the same constitutes a legal cause of action in her hands against the defendant in error. Also that the note made and delivered by the defendant in error to the plaintiff in error, as set forth in the second cause of action in the said petition, is a legal and binding contract between the parties.

We then come to the final and perhaps most important question, can the plaintiff in error maintain this action against the defendant in error in the District Court while they are living together as husband and wife?

I have been able to find but one adjudicated case exactly in point. *Wilson v. Wilson*, 36 Cal. 447. In this case, in 1856, the defendant William Wilson executed two notes in favor of the plaintiff Orpha Wilson, one for \$1,000 and one for \$1,300, each payable five years from date. In 1857, before the maturity of the notes, plaintiff and defendant intermarried and were living together as husband and wife at the time of the bringing of the suit. Defendant demurred relying upon two grounds: * * * ; secondly, that the facts do not constitute a cause of action in favor of the wife against the husband. The District Court sustained the demurrer and rendered judgment for defendant. On error to the Supreme Court the judg-

ment of the District Court was reversed. In the opinion of the court Chief Justice SAWYER says: "The present policy of the law is to recognize the separate legal and civil existence of the wife and separate rights of property, and the very recognition by the law of such separate existence and rights at law as well as in equity to hold and enjoy separate property involves a necessity for opening the doors of the judicial tribunals to her in order that the rights guaranteed to her may be protected and enforced."

In the State of New York the Commission of Appeals some four years ago considered and decided a case quite in point so far as the power of the wife to maintain an action against the husband is concerned. But in that case the note was given before marriage and in consideration of a promise to marry, and the parties had separated before the suit was brought. In the opinion the commission, by REYNOLDS, C., say: "The plaintiff therefore has a valid obligation against the defendant, which, in some form either at law or in equity, or in both, she can enforce in the courts. The Supreme Court in which the action was tried has 'general jurisdiction both in law and equity,' and it had jurisdiction of the persons of both parties to this controversy and could give judgment according to the very right of the case regardless of form, and in furtherance of the ends of justice might amend pleadings, conform pleadings to facts proved, etc. While it is admitted that the rights of the plaintiff could be enforced by suit in equity, yet it is insisted that this being an action at law, it cannot be maintained by a married woman against her husband. It might be asked, by what authority the defendant names this an action at law? What additional allegation in the complaint would have enabled the defendant to designate it as a suit in equity?"

* * * Certainly the defendant has been deprived of no legal right, and if the form of the pleadings was not agreeable to him it was very easy to have them made to conform to the facts proved by a proper application. If the complaint was not full enough to disclose the case in all its features it was competent for the defendant to spread the facts out in his answer by way of affirmative defense or otherwise, for all that has any bearing upon the rights of the parties grew out of one and the same transaction. While regard is still to be had in the application of legal or equitable principles there is not, of necessity, any difference in the mere form of procedure so far as the case to be stated in the complaint is concerned. All that is needful is to state the facts sufficient to show

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that the plaintiff is entitled to the relief demanded, and it is the duty of the court to afford the relief without stopping to speculate upon the name to be given to the action." *

But need we look further than to our own statutes for authority upon which to decide this case? Our Code provides that: "A woman may while married sue and be sued in the same manner as if she were unmarried." Gen. Stat. 528, § 31. This capacity to sue is not limited, and no person or class of persons is excepted from its effect. If she were unmarried there could be no doubt that she could sue this same man. This statute (as I understand it) plainly provides that she can do the same thing though married to him.

In the forepart of this opinion, I have endeavored to show by authorities that by the receipt and ownership of the two notes in question, the plaintiff in error had two legal and valid causes of action against the defendant. These obligations he fails to pay. It therefore becomes necessary that an action be brought against him to enforce payment.

These notes are her separate property, which we have seen, under the provisions of the statute, "may be used and invested in her own name." But how is she to use or invest the money represented by these choses in action unless she can collect it by suit? Even under the old system of practice, and before the beneficent legislation defining the rights of married women hereinbefore quoted, this could have been done by resorting to the circuitry of proceeding in the name of a trustee and a court of equity. But now, not only is the administration of law and equity vested in the one court, but all forms of procedure which heretofore distinguished legal and equitable suits are abolished, and the need of the intervention of a trustee is done away with by the statute which provides that "every action must be prosecuted in the name of the real party in interest." Gen. Stat. 528.

The conclusion is therefore irresistible that the action at bar was properly brought, and that the District Court erred in overruling the demurrer to the answer.

The judgment of the District Court is therefore reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

MARSH V. STEELE.

(9 Neb. 96.)

Constitutional law — attachment against non-resident without security.

A statute authorizing the attachment of the property of a non-resident without an undertaking, is constitutional.

ACTION on a promissory note. Motion to discharge an attachment levied on defendant's property without an undertaking. Motion denied. The other facts appear in the opinion.

J. H. Broady, for plaintiff in error, cited Story on Const., § 1800; Cooley Con. Lim. 15, and note, 397; *Ward v. Maryland*, 12 Wall. 418; *Williams v. Bruffy*, 6 Otto, 176; *Gassies v. Ballou*, 6 Pet. 761; *Paul v. Virginia*, 8 Wall. 180; *Lemmon v. People*, 20 N. Y. 607; *Slaughter House Cases*, 16 Wall. 118.

Groff & Montgomery and *T. L. Schick*, for defendants in error.

MAXWELL, Ch. J. Section 200 of the Code of Civil Procedure provides that "where the ground of attachment is that the defendant is a foreign corporation, or a non-resident of the State, the order of attachment may be issued without an undertaking. In all other cases the order of attachment shall not be issued by the clerk until there has been executed in his office, by one or more sufficient sureties of the plaintiff, to be approved by the clerk, an undertaking not exceeding double the amount of the plaintiff's claim, to the effect that the plaintiff shall pay the defendant all damages which he may sustain by the attachment, if the order be wrongfully obtained." Gen. Stat. 557.

It is claimed that the provisions of this section are in conflict with section 2, article 4 of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Kent says: "The privileges thus conferred are local and necessarily territorial in their nature. The laws and usages of one State cannot be permitted to prescribe qualifications for citizens to be

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claimed and exercised in other States, in contravention of their local policy."

It was declared in *Corfield v. Coryell*, 4 Wash. C. C. 371, that "the privileges and immunities conceded by the Constitution of the United States to citizens in the several States were to be confined to those which were in their nature fundamental, and belonged of right to citizens of all free governments. Such are the rights of protection, of life and liberty, and to acquire and enjoy property, and to pay no higher imposition than other citizens, and to pass through or reside in the State at pleasure, and to enjoy the elective franchise according to the regulations of the laws of the State. But this immunity does not apply to every right, for some may belong exclusively to resident citizens of the State," etc.

Cooley, in his work on Constitutional Limitations, 397, says: "Although the precise meaning of 'privileges and immunities' is not very definitely settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedy for the collection of debts and the enforcement of other personal rights; and the right to be exempt in person and property from taxes or burdens, which the property or persons of citizens of the same State are not subject to. * * * But it is unquestionable that many other rights and privileges may be made, as they usually are, to depend upon actual residence; such as the right to vote, to have the benefit of the exemption laws, to take fish in the waters of the State, and the like. And the constitutional provisions are not violated by a statute which allows process by attachment against a debtor not a resident of the State, notwithstanding such process is not admissible against a resident."

The constitutional provision must be confined to those privileges and immunities which are fundamental in their nature — such as the right to acquire and hold property, to institute and maintain actions, the exercise of the elective franchise in conformity to the laws of the State in which it is exercised — and was evidently intended to abolish the common-law disabilities of residents of the several States, the States to a certain extent being foreign to each other. This provision was not intended to prohibit distinctions founded on residence, such as the right to hold certain property exempt from execution;

the right to fish in the waters of the State, the right to vote, and other rights depending upon residence.

The only objection in this case, and the one on which it is sought to dissolve the attachment, is that "the said order of attachment was issued without any undertaking in attachment, and is null and void, there being no undertaking in attachment."

At common law, if the plaintiff made an affidavit that the cause of action amounted to ten pounds or upwards, he could have caused the defendant to be arrested, and required him to put in special bail for his appearance in the action. 3 Black. Com. 287. Imprisonment for debt was not a satisfaction thereof, but a means to procure it. Imprisonment for debt existed in all the colonies at the time of the Revolution, but the law was repealed or modified in most of the States during the second quarter of the present century. As a consequence, the abolition of imprisonment for debt has led to an enlargement of the remedies acting upon the property of debtors, and the statute authorizes an attachment against the property of a non-resident debtor. Mere temporary absence of a party from the State is not sufficient to justify an attachment under this provision; the party must be a non-resident of the State. The writ is issued to secure the appearance of the defendant, and to retain his property within the jurisdiction of the court, to be applied in satisfaction of its judgment to secure the rights of the creditor, as otherwise the property of the debtor could be withdrawn at any moment, and the creditor compelled to go into another jurisdiction, perhaps at a great distance from his residence, to enforce his rights. These are provisions that apply to all non-resident debtors, whether they reside in the United States or foreign countries, and are in consonance with the rule in the administrations of estates, that "every nation having a right to dispose of all the property actually situated within it, has (as has often been said) a right to protect itself and its citizens against the inequalities of foreign laws which are injurious to their interests." Story's Conflict of Laws, § 525.

And in relation to the withdrawal of funds it is said: "Persons domiciled and dying in one country are often deeply indebted to foreign creditors living in other countries, where there are personal assets of the deceased. In such cases it would be a great hardship upon such creditors to allow the original executor or administrator to withdraw those funds from the foreign country without the payment of such debts, and thus leave the creditors to seek their remedy

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in the domicile of the original executor or administrator, and perhaps there to meet obstructions and irregularities in the enforcement of their own rights from the peculiarities of the local law." Story's Conflict of Laws, § 512.

A plaintiff in attachment is liable in damages if he cause the defendant's property to be attached maliciously and without probable cause; and this liability attaches whether a bond is given or not. But the failure to give a bond when the attachment is against the property of a non-resident is not sufficient ground upon which to base a motion to dissolve the same, and is not in conflict with the Constitution of this State or the United States, and was therefore properly overruled. And particularly is this true in the case at bar, where judgment was obtained against the defendant, of which he does not complain, and the order of the court is merely to apply the property to the payment of the debt. The judgment of the District Court is clearly right, and is therefore affirmed.

Judgment affirmed.

ROOSE V. PERKINS.

(9 Neb. 304.)

Civil damage act — death of intoxicated person — damages.

In an action under the civil damage act for injury to means of support in consequence of intoxication, a recovery may be had where the intoxication caused the death of the intoxicated person; and in estimating the damages the condition of the family and the estate may be considered, but exemplary damages are not proper.*

ACTION under the civil damage act. The opinion states the facts. The plaintiffs had judgment below.

Lowley & Leese and *Norval Brothers*, for plaintiffs in error. Damages cannot be allowed for injury to means of support in consequence of the intoxication which caused the death of the intoxicated person. The statute does not give such an action, nor could one have been maintained at common law. *Davis v. Justice*, 31 Ohio

* See note, 25 Am. Rep. 393.

St. 359; S. C., 27 Am. Rep. 514; *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754.

Hart & Edwards and *McKillip & Page*, for defendants in error.

MAXWELL, Ch. J. Eliza Perkins, one of the defendants herein, brought an action in the District Court of Seward county, in her own behalf, and as next friend for her eight minor children, against Charles Hackworth, and the firms of Rummel & Goodbred, Kuhlenkamp & Weber, and Roose Bros. & Wolf, keepers of the various saloons in the town of Seward, to recover the sum of \$10,000, for injuries sustained by herself and children by the death of her husband, caused by liquors sold and furnished to him by the saloon keepers above named, whereby the means of support of herself and children were cut off and destroyed. On the trial of the cause a verdict was returned in favor of the plaintiffs for the sum of \$3,000, upon which judgment was rendered. Roose Bros. & Wolfe and Charles Hackworth bring the case into this court by petition in error.

[Omitting minor considerations.]

The fourth instruction is as follows: "In determining the amount which plaintiff should recover in this action, if any, you should consider the situation of the deceased—his annual earnings, his habits, his health, and his estate, if any, the profits of his labor, what he would have earned had he lived for the support of those entitled to recover, and the probability or the reasonable expectation of the life of the deceased at the time of the injury, and in determining this you may take into consideration the tables of expectancy which have been introduced in evidence."

It is the duty of a husband to support his wife, and there is a legal obligation on his part to do so, and the same is true as to a father supporting his minor children. This right of support is not necessarily limited to the bare necessities of life. The condition of the family and also that of the estate are proper to be considered by the jury, not for the purpose of determining how much may be required for the support of the family, but as an element in determining what the amount of injury may be from the loss of support, as in no case in this kind of action can the judgment exceed the value of such support, whatever may be the necessities of the family.

It is claimed that damages cannot be allowed for loss of support when death has been caused by intoxication. In *Davis v. Justice*,

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31 Ohio St. 359; *S. C.*, 27 Am. Rep. 514, it was held that there could be no recovery in such case. Section 7 of the statute of Ohio is as follows: "That every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, such wife, child, parent, guardian, employer, or other person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons," etc. The court held, that as at common law, actions for personal injuries abate by death, and cannot be revived or maintained by the executor or by the heir, therefore, as the legislature had not said in terms that an action for loss of the "means of support" should survive, no action could be maintained. The decision is placed on the ground that the action was brought to recover damages for the *death* of the husband, whereas the action was brought for the loss of the means of support, and the death of the husband was a mere incident, which affected the measure of damages. We cannot give our assent to the doctrine laid down in the opinion of the majority of the court in that case. The action being for loss of the means of support, it will lie in any case where the loss is merely temporary, as by disability, or permanent as by death. *Rafferty v. Buckman*, 46 Iowa, 195; *Hackett v. Smelsley*, 77 Ill. 109.

The Carlisle tables of expectancy were properly admitted. The deceased is shown to have been a robust, healthy man, who, but for the use of intoxicating liquor, appears to have had the ordinary prospects of life. The case differs in that regard from that of *Rafferty v. Buckman*, 46 Iowa, 200. But as the plaintiffs in error made no objection in the court below to them, the objection is unavailing in this court.

[A minor request omitted.]

The defendants also asked the following instruction: "2. The plaintiffs are not entitled to exemplary damages," which the court refused to give, to which the defendants excepted.

This instruction should have been given. Damages are given as a compensation, recompense or satisfaction to a plaintiff for an injury actually received by him from the defendant. They should be equal in amount to the injury sustained; but upon what principle can they be given in excess of that amount? Where damages are awarded

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for an injury, they are compensation therefor so far as money can compensate for the injury. In law the party injured, upon being allowed this compensation, has no further claim upon the defendant for that injury; therefore he is not entitled to recover more. If it be said that such damages are given as a punishment, it may be answered that the State inflicts punishment, not individuals; as between individuals, courts enforce rights. The law protects everyone in the enjoyment of his property, and it cannot be taken from him under the pretext of punishment, and given to another. The effect, ordinarily, of instructing a jury, that they may find exemplary damages, is to say to them that in estimating damages, they need be governed by no rules, be bound by no oath, and that they may return a verdict for such sum, not exceeding the amount claimed, as according to their whim or caprice they may deem expedient, without regard to the amount of the injury. The rule adopted by this court in *Boyer v. Barr*, 8 Neb. 68; S. C. 30 Am. Rep. 814, is just and equitable and more satisfactory, and to that we adhere.

[Omitting a minor matter.]

Reversed and remanded.

 SCOFIELD V. STATE NATIONAL BANK OF LINCOLN.

(9 Neb. 316.)

National bank—power to enforce mortgage.

A national bank organized as successor to a State bank may maintain an action to foreclose a mortgage of real estate executed to the State bank as security for a note, and assigned to it by the State bank on the formation of the national bank.

PETITION for injunction. The opinion states the facts. The petition was dismissed below.

G. B. Scofield, for plaintiffs in error. National banks have no power to take deeds of trust or mortgages on real estate as security, and have no power not conferred by congress. An injunction will be granted to prevent a sale by the bank of such mortgaged property. *Matthews v. Skinker*, 62 Mo. 329; S. C., 21 Am. Rep. 425; *Beaty v. Knowler*, 4 Pet. 152; *Wiley v. First Nat. Bank Brattle*

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Idem, 47 Vt. 552; *S. C.*, 19 Am. Rep. 122; *Fowler v. Scully*, 72 Penn. St. 468; *S. C.*, 13 Am. Rep. 699; *McMaster v. Reid*, 1 Grant Cas. 36.

E. F. Warren, for defendants in error.

MAXWELL, Ch. J. In the year 1878 the plaintiffs filed their petition in the District Court of Otoe county setting forth, in substance, that on or about the 5th day of August, 1871, Gilbert B. Scofield executed to the State Bank of Nebraska a promissory note for the sum of \$600 due January 1, 1872, and to secure the payment of the same himself and wife executed a mortgage upon certain real estate in Nebraska City; that on the 16th day of November, 1871, said State bank was organized as a national bank under the provisions of the act of congress, approved June 3, 1864, and the amendments thereto; and that under and by virtue of said act of congress the State National Bank was prohibited from purchasing, dealing or speculating in mortgage securities of any character or promissory notes unless taken to secure a debt contracted by the bank, or to prevent a loss upon a loan made by it after its organization; that about the 1st day of January, 1873, the State National Bank, through its officers, had assigned to it the note and mortgage hereinbefore mentioned; that said purchase and assignment were illegal and void so far as these plaintiffs are concerned, and that the plaintiffs are not now, and never have been, indebted to the State National Bank of Lincoln; that about the 3d day of April, 1875, the State National Bank of Lincoln commenced proceedings in the District Court of Otoe county to foreclose said mortgage, and that on or about the 8th day of December, 1876, a decree of foreclosure was rendered by the court in said cause, and the plaintiffs allege that the proceedings of foreclosure and the decree are null and void; that the State National Bank was not the owner of said note and mortgage and had no lawful right to bring suit thereon; that the State Bank of Nebraska, before the pretended assignment of the note and mortgage, was indebted to the plaintiff, Gilbert B. Scofield, in the sum of \$833, which should have been applied as payment upon said note and mortgage; that upon said illegal and void foreclosure the State National Bank has obtained an order of sale and is about to sell said mortgaged premises, etc. The plaintiffs pray for an order restraining the defendants from proceeding under said order of sale, and that said decree of foreclosure may be set aside and held for naught, etc.

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The defendants in their answer set up the decree of foreclosure and allege that the plaintiffs appeared in that action and plead as a defense to the same the matters set up in the petition in this case, together with the set-off of \$833, and that said matters have been fully adjudicated and determined. The plaintiffs filed no reply to the answer but filed a motion for judgment on the pleadings. The motion was overruled and the case dismissed.

[Omitting minor matters.]

The plaintiffs lay much stress upon the act of congress approved June 3, 1864, contending that a national bank is absolutely prohibited from purchasing notes secured by mortgage.

Section 28 of that act provides that: "It shall be lawful for any such association to purchase, hold and convey real estate as follows:

"First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by such association, or it shall purchase to secure debts due to said association.

"Such associations shall not purchase or hold real estate in any other case, or for any other purpose than as specified in this section; nor shall it hold the possession of any real estate under mortgage, or hold the possession of any real estate, purchased to secure debts due to it, for a longer period than five years."

Section 46 provides "that any bank incorporated by special law, or any banking institution organized under a general law of any State, may, by authority of this act, become a national association under its provisions by the name prescribed in its organization certificate; and in such case the articles of association and the organization certificate required by this act may be executed by a majority of the directors of the bank or banking institution; and said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate and to change and convert the said bank or banking institution into a national association under this act. * * * Provided, however that no such association shall have a less capital than the amount prescribed for banking associations under this act."

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It will be seen that the statute expressly provides that a State bank may organize as a national bank. That is, the national bank may become the successor of the State bank. In such case what would become of the assets of the State bank? The statute evidently intends that they shall be turned over to the new organization. If it were not so, no advantage would be gained by permitting a State bank to organize as a national bank. If the State bank was required to close up its own affairs, and collect its own notes, before the new organization could be perfected, the provisions of section 46 would be meaningless. In no case, however, can the amount of paid-up capital be less than is required by the statute. But suppose there was no authority under the statute to transfer the assets of the State bank to the State National Bank, how will it avail the plaintiffs in this action? That the State National Bank was the owner of the note and mortgage in question at the time the decree of foreclosure was rendered there is no doubt. The mortgage was the valid contract of the plaintiffs, made as security for the payment of money received by them. Did this contract become void by being transferred to the bank? If so, upon what principle? The statute does not declare such transfers void, and in our opinion, the bank may maintain an action to foreclose such mortgage. *National Bank v. Matthews*, 8 Otto, 621. The motion for judgment on the pleadings was therefore properly overruled.

[Omitting a minor matter.]

Judgment affirmed.

MAPSTRICK V. RANGE.

(9 Neb. 390.)

Conspiracy — employees stopping and returning unfinished work.

The eighteen defendants, journeymen tailors, working for the plaintiff by the piece, by conspiracy stopped work simultaneously, and returned their work to the plaintiff unfinished, and worthless in that condition. The plaintiff was unable to get any hands to finish the work. *Held*, that he might maintain an action of damages.

ACTION of damages for conspiracy. The opinion states the case. The plaintiff had judgment below.

N. J. Burnham, for plaintiff in error. Conspiracy in the eye of the law is the corrupt agreeing together of two or more persons to

do by concerted action something unlawful as a means or end. Bish. Crim. Law, § 149. The act must be unlawful, and it must be injurious to an individual or the public, by reason of the combination. When the injury contemplated by the conspiracy is of the former class, and is meant to fall upon an individual in distinction from the public at large, the combination must be of a nature to place the conspirators on an unfair ground toward him, a ground which alone one with the evil intent would not occupy — and whether an individual or the public is to be wronged, the wrong must be of a sufficient magnitude for the law to notice. Taking this case in the light of the above rule of law, there is certainly no conspiracy. *Commonwealth v. Hunt*, 4 Met. 111. As to the offense of the conspiracy itself, there is no difference whether the unlawful thing is the means or the end. If both means and end are unlawful *a fortiori*, the offense is constituted. If neither is unlawful there is no offense. *State v. Richey*, 9 N. J. Law, 293; *State v. Norton*, 23 id. 33.

John L. Webster and Ralph E. Gaylord, for defendant in error.

COBB, J. The plaintiff in error makes two points: First, that the petition in the court below does not state facts sufficient to constitute a cause of action; and second, that said cause, which was originally tried in the County Court of Douglas county, was argued and submitted to the jury, verdict rendered, etc. on the 17th day of May, 1876, that being after the third Monday of the month, at a time when the court had no authority to act.

The petition is certainly rather scant, and had a motion been made for an order requiring the plaintiff to make it more definite and certain, it would probably have been sustained. But after verdict, I think the allegations of the petition sufficient to sustain the judgment.

The petition alleges that the plaintiff was damaged by reason of the defendants having, pursuant to a conspiracy previously formed between themselves, on the 31st day of March, 1876, stopped working for the plaintiff, and returned to him all jobs of work then in their hands in an unfinished condition, and that they did return to the plaintiff various and numerous pieces or jobs of work (tailoring) in an unfinished state, which were entirely worthless in said unfinished condition; that said plaintiff could not at said time get any men to finish said work. Whereby said plaintiff had been damaged in the sum of \$371.

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One of the issues made by the answer was that the plaintiff sustained no damage by reason of the return to him by the defendants of the said jobs (garments) in such unfinished condition, and there was testimony before the jury in the County Court to that point. I do not think that there is much difficulty in the proposition, that where a merchant tailor has a large number of journeymen working for him by the piece, making up garments for his customers out of material furnished by him for that purpose, and by a preconcerted arrangement among themselves, the journeymen, instead of finishing the work and thus enabling him to keep his engagements with his customers, all return the garments in an unfinished state, he would be damaged as well directly, in losing the money which his customers would have paid him if he could have delivered the garments to them in a finished condition, as indirectly, by the loss of customers and the damage to the character of his house for punctuality. The case of *Jones v. Baker*, 7 Cow. 445, is in point, and I quote a part of the syllabus: "In all other cases of conspiracy the remedy is by action on the case, and one may be convicted and the other acquitted. In these actions actual conspiracy need not be proved; it may be inferred from circumstances, among which are the acts of the parties in doing the injury which was the object of the conspiracy.

"J., a merchant tailor, was engaged in carrying on a profitable trade in his line of business from New York to New Orleans, the successful prosecution of which depended on a knowledge of certain things known to so few that his gains were very large. B. conspired with J.'s foreman, in J.'s absence, to obtain the secrets of the business; did obtain them; and was in consequence enabled to rival J. in his trade; and J. was otherwise injured. Held, that an action on the case lay against B. and the journeyman, at the suit of J., for the conspiracy; and that one of the defendants might be convicted and the other acquitted.

"In such a suit the damage is the gist of the action, not the conspiracy."

[Omitting minor matters.]

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

SEWALL V. CITY OF COHOES.

(75 N. Y. 45.)

Municipal corporation — negligence — quasi street — low bridge.

Where the officers of a municipal corporation have treated a piece of land as a public street, taking charge of, regulating and paving it like other streets, although it has never been legally laid out as a street, the corporation is chargeable with the same duties and subject to the same liabilities as if it had been properly laid out, and is bound to keep it in safe condition for travel. The fact that a bridge over a city street is of sufficient height to allow ordinary carriages to pass under it, does not of itself discharge the municipality from liability to one injured while attempting to pass under it in a vehicle of unusual height, as in this case, a circus wagon.

ACTION for personal injury by negligence. Plaintiff, in the employ of a circus company, and driving a team of six horses attached to a vehicle twenty-one feet in length and ten or twelve feet high, seated upon the top of this vehicle, drove through White street, in Cohoes, turning upon a strip of land by the side of the Erie canal, for the purpose of crossing the canal. Over and across this strip of land, near White street, was a bridge or tramway, ten feet above the pavement, used to transport coal from the canal to a coal yard on the other side of the strip of land. He was a stranger in the city and did not know of the tramway. After the leading horses turned the corner, plaintiff looked back to see if the hind wheels of the wagon would clear the corner, and did not look

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forward or see the tramway until just as the second pair of horses passed under it. He endeavored in vain to stop the horses, and was crushed between the tramway and the wagon. About fifteen months before the accident, this strip of land had been graded and paved as a street, in pursuance of resolutions of the common council of Cohoes, which fixed the grade, etc., and it was used as a public highway. The tramway was in existence before this action of the common council. Other facts appear in the opinion. The plaintiff had judgment below.

Matthew Hale, for appellant. There was no evidence of any negligence on the part of defendant. *Gorham v. Cooper*, 59 N. Y. 660; *Mayor of Albany v. Cunliff*, 2 id. 165; *Munn v. City of Pittsburg*, 40 Penn. St. 364; *Whitney v. Town of Essex*, 38 Vt. 270; 2 Laws of 1869, p. 2384; 2 N. Y. 165; *Trustees of Jordan v. Otis*, 37 Barb. 50; 1 R. S. 218, §§ 4-8; Laws of 1837, p. 518, § 6. The tramway being in existence before defendant paved and graded the passage, the city was not bound to remove it. *Hume v. Mayor of N. Y.*, 9 Hun, 674; 47 N. Y. 639; *City of Madison v. Ross*, 3 Ind. 236; *Turnpike Co. v. Hoadley*, 11 Conn. 464. Plaintiff's negligence contributed. *Carolus v. Mayor*, 6 Bosw. 15; *Hubbard v. Concord*, 35 N. H. 52; *Raymond v. Lowell*, 6 Cush. 524; *Wilcox Case*, 39 N. Y. 358; *Barker Case*, 45 id. 191.

J. H. Chute, for respondent.

MILLER, J. The plaintiff was injured by coming in contact with a bridge or tramway which was placed across the street through which he was driving the team under his charge. The officers of a municipal corporation are vested with authority as commissioners of highways, in regard to the streets within its limits, and as such are agents of the corporation so as to make the latter civilly responsible for acts of omission or commission according to the law applicable to master and servant. *Conrad v. Trustees of the Village of Ithaca*, 16 N. Y. 158; *Weet v. Trustees of Brockport*, id. 161; *Hyatt v. Trustees of Rondout*, 44 Barb. 385; *Todd v. City of Troy*, 61 N. Y. 506. If they fail to keep the streets in a safe condition for public travel, a person who suffers damage and is free from fault can maintain an action against the city for damages sustained by reason of their neglect of duty.

In the case at bar the bridge or tramway which was the occasion

of the accident appears to have been erected by the owners of a coal yard, and there was evidence tending to show that the land upon which the street was located belonged to the State and not to the city. Conceding that such was the case, we think that under the evidence presented upon the trial the defendant was not relieved from liability. The land had been appropriated by the defendant, graded, paved, and sidewalk put down by its authority, and was used as a public street in such a manner as to hold out ostensibly to the public that it was such a street and as to invite them to travel upon it. To all appearances, it being uniformly graded and improved with gutters and pavement, it was one of the thoroughfares of the city, open and free to all, which the municipal authorities assumed the burden and duty of improving to the same extent and in a similar manner as was done in regard to other public streets within its boundaries. Under such a state of facts the defendant having assumed to perform the same duty in regard to it as if it had been formally and lawfully laid out and adopted, was bound to the same degree of vigilance as was imposed upon it in reference to other streets within the limits of the corporation. It matters not, we think, that the tramway was erected and used by the owners of the coal yard, and it is quite sufficient that the defendant had assumed to, and did, exercise the right to use the land as a street, and to control the same by making improvements, and as bearing on the question after the injury was committed, directed and caused the removal of the tramway as dangerous to life and property, to fix the liability of the corporate authorities. It is claimed that the acts of the defendant, to which reference has been had, did not destroy the right to use the tramway or impose any other duty than to keep the pavement in repair; that it did not require the removal of the same, and that the defendant was not subjected to any liability arising from negligence in not removing the same. We think that the defendant was bound to exercise the same degree of care and vigilance in reference to this street as if it had owned the right of way, and it had been lawfully set apart as one of the streets of the city, and that it was obligated to protect the public from all injuries which might arise from any neglect to take proper charge of the same.

The authorities referred to by the defendant's counsel do not uphold a position adverse to the rule laid down, as will be seen by a reference to the leading case which is cited to sustain the position contended for.

In *Mayor, etc., v. Cunliff*, 2 Comst. 165, which is especially relied upon by the defendant, the action was brought for injuries sustained by the falling of a bridge which was built in pursuance of a contract with the corporation, under a statute not constitutionally passed by the legislature, which fell in by reason of the negligent construction thereof. It appeared that the "Pier Company" of said city had the care and control thereof and made repairs upon it, and paid a sum awarded to the corporation under the provisions of the act referred to for the improved value by reason of the reconstruction thereof by the corporation. It was held, that in the performance of a public work, the law must have imposed a duty or conferred an authority to do such work. It will be noticed that the defendant had built the bridge under a statute which was declared to be unconstitutional, and that at the time when the accident happened, the bridge was not under the control of the defendant but of the pier company. It will thus be seen that no duty was imposed upon the defendant to build the bridge in question, and as the law conferred no authority, there could be no liability. Some remarks are made in the opinion of Cady, J., to the effect that officers of a corporation are limited in their legitimate action to the powers conferred upon them by their charters. This rule might well apply when there was an entire want of power and the corporate body was acting in reference to a matter which was entirely beyond its control and authority, and it was manifest that another party had the control of the bridge, which was defectively constructed, and by means of which defect the accident occurred. But when the corporation is vested with ample power to perform the act done, such as the laying out of a street, it cannot well be claimed that they are relieved from liability from injury for their neglect, because the act was not done strictly according to law. If such a rule should prevail, the slightest error in acquiring a right to a public street would leave a party injured by the negligence of the corporate authorities to take care of and keep the same in repair, without a remedy or means of redress. Having the power to lay out streets, the omission to do it lawfully does not exonerate the corporation from liability from negligence when its officers assume to hold out to the public that a street is located within its limits, and they are invited to use it and to travel upon it. Such a rule would compel a traveler to determine for himself whether the street was lawfully laid out, and is not upheld by the case cited or supported by authority.

Although the precise question discussed has never been directly presented in this State, the authorities are numerous which sustain a contrary view, as will be seen by a reference to the cases. In *Mayor v. Sheffield*, 4 Wall. 189, it is held that where the authorities of a city or town have treated a place as a public street, taking charge of it and regulating it as they do other streets, and the injury occurs by reason of negligence, the corporation cannot, when sued for such injury, defend itself by alleging irregularity in the proceedings or a want of authority, in establishing the street. The rule is well settled that the act of the city in assuming authority to control the land as a street renders it chargeable with the same duties, and imposes upon it the same liabilities, as if it had been lawfully laid out, and it is estopped from questioning that it was a lawful road or street. *House v. Town of Fulton*, 34 Wis. 608; *S. C.*, 17 Am. Rep. 463; *Stark v. Lancaster*, 57 N. H. 88; *City of Aurora v. Colshire*, 55 Ind. 484; *Phelps v. City of Mankato*, 23 Minn. 276. In the last case cited it was held that it was immaterial whether the street became such by formal acceptance and user by the public so far as regards the duty of the city to keep it in safe condition. It follows that the defendant, by adopting the land and allowing it to be used as a street, holding out to the public that it was such street, and by repairing and improving it as such, was bound to exercise the same degree of care as if it had been laid out strictly according to law, and it cannot escape liability for the alleged reason that it had no control over it and the land belonged to the State.

It is urged, that even if the resolution of the common council and their acts in pursuance thereof were sufficient to establish a street, yet it was not legal negligence to omit removing the tramway. The ground upon which this position is asserted is, that the space between the street and the tramway was more than was necessary for ordinary carriages. It is undoubtedly true that the vehicle which the plaintiff drove was in height somewhat unusual, and beyond that which ordinarily was employed for any purpose. But this does not furnish a sufficient excuse in the corporate authorities of a city for obstructing the passing of carriages of unusual and extraordinary proportions, and establish negligence *per se*. It is well understood that such vehicles are used for the purpose of attracting attention in large cities and elsewhere, of those who may desire to attend shows and exhibitions of the character of the one which was to be exhibited in the city, when the accident occurred, and while no defi-

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nite rule can be laid down to meet all cases, we think that it was for the jury to determine, under the circumstances, whether the vehicle used was of such dimensions, as to be suitable and proper to be used in a populous city upon a street established for the common benefit and convenience of the public at large. There are no doubt cases where archways and bridges exist in cities over streets, under the control of the authorities, from which vehicles of this description are properly excluded, and they would lawfully be regarded as obstructions; but these are well-known localities, sanctioned by law or custom, which are understood by all, as not intended for any such purpose. So also in the country, covered bridges may be erected over streams for ordinary purposes, which are far too low in height to authorize the passage of vehicles or animals of an extraordinary size. See *Turnpike Co. v. Hoadley*, 11 Conn. 464; *Gregory v. Inhabitants of Adams*, 14 Gray, 242.

The question whether the plaintiff was justified in driving the team under the tramway, under the facts in evidence, was for the determination of the jury, having in view the character of the team and the nature of the obstruction, and it cannot, I think, be claimed, was improperly decided by the jury. The question of contributory negligence on the part of the plaintiff was also for the jury. He was bound to exercise ordinary care, prudence and capacity, and it is not clear that he did not use his faculties to the utmost extent. His attention was at the time engaged in an opposite direction from the tramway, and in taking care of his team. He cast his eye backward for the purpose of seeing that the hind part of the wagon cleared the corner, and the first he knew he was right under the bridge. It is evident that the time was very short between the period when the plaintiff looked backward, and the time when he came in contact with the bridge, but it is not so clear that the act was negligent, and that the plaintiff failed to exercise proper care and caution, and to do all that was required of him as a prudent man in the management of his team. *Gillespie v. City of Newburgh*, 54 N. Y. 468.

[Omitting minor matters.]

No error being found in any of the rulings upon the trial, the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

NEWELL V. NICHOLS.

(75 N. Y. 78.)

Evidence — survivorship — presumption — common disaster.

In the case of a mother, aged sixty-nine years, her son-in-law, aged forty-five, and his two children, aged respectively ten and seven years, who all perish in the same shipwreck, there is no presumption of survivorship. *

ACTION for the judicial construction of a will. The question was of survivorship between the mother of the testatrix, the husband of the testatrix, and his two children, who all perished in the same shipwreck, aged respectively sixty-nine, forty-five, ten and seven years. There was no evidence as to which survived. The court below held that there was no presumption of survivorship.

Geo. C. Genet, for appellants.

William Fullerton, Henry Arden, B. Roelker, Geo. C. Blanks, for respondents.

CHURCH, Ch. J. The able and elaborate opinion delivered by Judge VAN VORST, who tried the case at special term, renders it unnecessary to elaborate the questions involved. I have examined with care all the points presented, and I concur fully with the opinion upon all of them, and with the views expressed therein.

The principal points decided are: 1st. That the appellants who claim through a survivorship must prove the survivorship. 2d. That there is no presumption in law of survivorship in the case of persons who perish by a common disaster, as in this case, by shipwreck, without other evidence tending to prove the fact, and hence that the party upon whom the *onus* lies fails to establish it. 3d. That the property never vested in the children, but the title remained in the trustees until the death of the children; that the trust was an active one, and valid, and title was necessary to its execution. 4th. That there was not an equitable conversion from real to personal estate at the death of the testatrix, the power to sell being discretionary.

* To same effect. *Russell v. Hallett*, 23 Kans. 276.

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5th. That the remainder over was a conditional limitation, and not a condition precedent, and that the intent of the will was that it should be effectual if for any reason the children could not take.

6th. That the death of the children without issue or appointment, under the circumstances developed without evidence of survivorship, establishes the title of the persons to whom the remainder is limited, and entitles them to have the limitation carried into effect.

I should be content to adopt the opinion without further remark but for considerations which have suggested themselves to some of my brethren in respect to the question of survivorship, as applicable to the position of the appellants, which will be briefly noticed. The suggestion as I understand it, is, that conceding the burden of proving survivorship to be upon the appellants, and that in this case there is no presumption that either particular child survived, yet as the law will not presume that they died at the same time, a presumption may be indulged that there was a survivor, and that it makes no difference which child survived as he would inherit the share of the other, and create a new line of descent for that share which would embrace the appellants. This of course would affect but one of the children's share, or one-quarter of the estate. The suggestion although apparently plausible in statement, cannot be sustained.

In the first place, assuming such a presumption, it may be observed that the appellants are required to prove their right or title. Can a party successfully claim that as he is entitled to one thing or another, and as they are alike, he will take either? It is an accidental circumstance that the shares of these children were alike in amount or kind. Suppose they had been unequal in amount, or that one had been in land, and the other in money, could the appellants have claimed either? Clearly not. As to the daughter's share there was a failure to prove a title because it does not appear that the son survived the daughter, and the same is true of the share of the son. The appellants hold the affirmative, and must establish their title to some specific share or interest which they fail to do by an alternative claim. As they cannot claim either, have they not failed as to both? A somewhat similar point, though upon a different ground was presented in *Wing v. Augram*, 8 H. L. 183. The estate was limited to one Wing upon certain conditions in the respective wills of husband and wife, who were lost at sea. The husband gave everything to the wife, and adds: "And in case my wife shall die in my lifetime * * * then I give all my estate to William Wing."

And the wife gave everything to the husband, and stated, "and in case my husband should die in my lifetime, then I devise, bequeath, and appoint the said property to the use of William Wing." Wing claimed under both wills, but the court denied his claim under either, because he could not prove that either husband or wife survived. It is true in that case that the wills created a condition precedent, but as the condition was the same in each will the ultimate legatee claimed under both on the ground that it was immaterial which survived. Lord CHELMSFORD, in answering this point, said: "If different persons had been entitled under the two wills, each must have established his claim solely by the will in his favor, independently of the other, and no difference can be made in the rules of evidence, because the appellant accidentally happened to be the ultimate legatee in each will." The claim was not predicated upon the presumption of a survivor as here, but upon a unity of rights and interests, as legatee under both wills.

I do not think an alternative claim can be sustained, conceding the presumption of survivorship. However this may be, a decisive answer to the suggestion is, that there is no legal presumption which courts are authorized to act upon that there was a survivor any more than that there was a particular survivor. It is not claimed that there is any legal presumption that the children died at the same time. Indeed, it may be conceded that it is unlikely that they ceased to breathe at precisely the same instant, and as a physical fact it may perhaps be inferred that they did not. But this does not come up to the standard of proof. The rule is that the law will indulge in no presumption on the subject. It will not raise a presumption by balancing probabilities, either that there was a survivor, or who it was. In this respect the common law differs from the civil law. Under the latter, certain rules prevail in respect to age, sex, and physical condition, by which survivorship may be determined, but nothing can be more uncertain, or unsatisfactory than this conjectural mode of arriving at a fact, which from its nature must remain uncertain, and often upon the existence of which the title to large amounts of property depend. In the language of the Lord Chancellor, in *Wing v. Underwood*, 4 DeGex, M. & G. 633, "We may guess, or imagine, or fancy, but the law of England requires evidence." There are cases where a strong probability in theory at least would arise, that one person survived another, and perhaps as strong as that that there was a survivor, and yet the common law

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wisely refrains from acting upon it in either case. It is regarded as a question of fact to be proved, and evidence merely that two persons perished by such a disaster, is not deemed sufficient. If there are other circumstances shown, tending to prove survivorship, courts will then look at the whole case for the purpose of determining the question, but if only the fact of death by a common disaster appears they will not undertake to solve it on account of the nature of the question, and its inherent uncertainty. It is not impossible for two persons to die at the same time, and when exposed to the same peril under like circumstances, it is not as a question of probability very unlikely to happen. At most the difference can only be a few brief seconds. The scene passes at once beyond the vision of human penetration, and it is as unbecoming as it is idle for judicial tribunals to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first, especially when the transmission of title to property depends upon it, and hence in the absence of other evidence the fact is assumed to be unascertainable, and property rights are disposed of as if death occurred at the same time. This is done not because the fact is proved, or that there is any presumption to that effect, but because there is no evidence, and no presumption to the contrary. The authorities are uniform upon this doctrine, but the expressions of some of the judges in announcing it are liable to be misunderstood as indicating a presumption of simultaneous death which is not the rule. For instance, Sir WILLIAM WYNNÉ said: "I always thought it the most natural presumption that all died together, and that none could transmit rights of property to another." *Rex v. Heaps*, 2 Salk. 593; 2 Phill. 296, note c.; *Doe v. Nepean*, 5 B. & Ad. 91, 92.

Sir JOHN NICOLL said: "I assume that both perished in the same moment." *Taylor v. Diplock*, 2 Phill. 261. *In the Matter of Selwyn*, 3 Hagg. Ec. R. 748, the court said: "But in the absence of clear evidence, it has generally been taken that both died in the same moment." Sir HERBERT JENNER said: "The parties must be presumed to have died at the same time." 1 Curties, 705.

These expressions only mean that as the fact is incapable of proof, the one upon whom the *onus* lies fails, and persons thus perishing must be deemed to have died at the same time, for the purpose of disposing of their property. The Lord Chancellor in *Wing v. Underwood*, *supra*, recognized the distinction, and explained the meaning of the rule. In commenting upon a similar expression of

the Master of the Rolls to the effect that he must assume that Mr. and Mrs. Underwood both died together, the chancellor said: "From personal communication with his honor, I know that he is not aware that he ever used such an expression, and all he ever meant to say was that the property must be distributed just as it would have been if they had both died at the same moment." And Mr. Best in his work on Presumptions, after laying down the general rule, states that it is not correct to infer from this that the law presumes both to have perished at the same moment, and adds: "The practical consequence is however nearly the same, because if it cannot be shown which died first, the fact will be treated by the tribunal as a thing unascertainable, so that for all that appears to the contrary, both individuals may have died at the same moment."

All the common-law authorities are substantially the same way, and the rule, which I think is wise and safe, should be regarded as settled. Its propriety is not weakened by the circumstance that its first application in this court prevents this estate from being turned into channels never contemplated or intended by the testatrix.

The judgment must be affirmed.

All concur, except MILLER and EARL JJ., absent at argument.

RAPALLO, J., concurs in all except as to survivorship between the two children, and as to that does not vote.

Judgment affirmed.

COWEE V. CORNELL.

(75 N. Y. 91.)

Fraud, constructive — negotiable instrument — memorandum — gift.

Action upon a promissory note for \$20,000, made by the grandfather of the payee, payable in five years, with interest annually. The maker was ninety-two years old and partially blind, but was otherwise in good health, was in good possession of his mental faculties, and active in looking after his financial affairs. He was possessed of a large property, which his grandson assisted him in taking care of, and to do which, at his grandfather's request, he had given up his profession, and for several years had devoted himself to his grandfather's service, as his confidential agent. The grandfather had also given him \$32,000 in his lifetime, and the grandson also claimed a gift of \$30,000 beside. He was also a legatee to a considerable amount. When the note was executed it was attached to a stub, the whole being torn from the

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maker's note-book of blank forms, and filled up and signed in the old gentleman's handwriting. The stub contained memoranda of the date, amount, maturity and payee's name, and the words, "to make the amount the same as Chas. W. Cornell." The latter was another grandson, to whom he had given \$20,000. It was shown that he had proposed to alter his will in order to make a better provision for his grandson's services, but was advised by his lawyers to adopt some other mode. A few months afterward the note was executed. The stub was removed, and the note was transferred to the plaintiff, after interest had fallen due and remained unpaid, the plaintiff giving his own note for it, which remained overdue and unpaid in the hands of the payee. *Held* (1), that the plaintiff was not a *bona fide* holder;* (2), that the stub was not conclusive evidence that the note was designed as a gift; (3), that there was nothing in the relations of the parties or the circumstances to impose the burden on the payee of showing the fairness of the transaction, or imply the idea of undue influence.

CLAIM on a promissory note against the estate of Latham Cornell, deceased. The deceased was the grandfather of Latham C. Strong, the payee. He had a large estate, consisting of land, stocks, bonds and other securities. He died in 1876, aged ninety-five. He was partially blind for four years before his death. In the early part of 1871, the grandson was the city editor of the Troy Daily Whig newspaper, but at his grandfather's request, he gave up that occupation to assist him in his affairs. From July, 1871, until the time of his death, his grandson, at his request, attended to his affairs, writing his letters, looking after his banking business and his rents, making out his bills, cutting off his coupons, reading to him, and occasionally going away from home to transact other business. In July, 1871, Cornell gave to Strong a deed of two adjoining houses in the city of Troy, valued at about \$32,000, in one of which houses the grandfather lived until the time of his death. The grandson moved into the adjoining house in the spring of 1872, and resided there until after his grandfather's death. During the time that the two thus lived in adjoining residences, they were in daily conference upon business matters of the old gentleman, in the house occupied by the grandson. The grandfather kept and controlled his own securities, and there was no evidence that he was weak either in mind or body. On the contrary, it appeared that he took an active and intelligent interest in the management of his own affairs. The grandson, with his family, consisting of five persons, during all this time lived at the sole expense of the grandfather, and claims to have

* See, *contra*: *Kelly v. Whitney* (45 Wis. 110), 30 Am. Rep. 697.

received, in addition to the note in suit, as gifts from his grandfather, \$30,000 in government bonds, and the assignment of a mortgage for about \$1,700. At what particular time it is claimed these gifts were made is not in evidence. Mr. Cornell had made his will in 1871, providing a legacy of \$15,000 for Mr. Strong. In the fall of 1872, Mr. Strong expressed a desire again to go into business for himself and to be independent of his grandfather, and left home and actually was in negotiation with different persons in Troy and New York with a view of forming business associations. Mr. Cornell caused him to be written for to come home. Mr. Strong came back to Troy, and his grandfather said to him then, as he had previously said, that he wanted him to give up his idea of leaving, and to devote his whole time to the business of his grandfather; that his affairs would engross his time, and he had no one else to look after his business; and he frequently said that there was money enough for all of them. Mr. Strong immediately abandoned his business projects, and devoted his whole time and attention to his grandfather's business until the death of the latter in 1876. In the fall of 1872, Mr. Cornell sent for his legal advisers and proposed to alter his will so as to make provision to compensate his grandson for having devoted himself to his business. What provision was intended is not disclosed by the evidence. The lawyers advised that his will be left unaltered, and that he take some other way of compensating his grandson. Mr. Cornell afterwards executed the note in question, as follows:

\$20,000.

TROY, *April 1, 1873.*

"Five years after date I promise to pay Latham L. C. Strong, or order, \$20,000 for value received, with interest yearly.

"L. CORNELL"

The note was on a printed form, in a blank-book belonging to the maker, the name of the payee being printed "Latham Cornell." The note was filled up in the handwriting of the maker, but in striking out with his pen the name of the payee he left the word "Latham" and afterwards interlined the full name, "L. C. Strong." Annexed to the note was a stub with some printed forms, memoranda of date, amount, on which Mr. Cornell wrote: "Troy, April 1st, 1873. L. C. Strong, \$20,000 at five years, to make the amount the same as Chas. W. Cornell." The stub was on the note when it was delivered to the payee, but was torn off by him before it was transferred to the plaintiff; and there is no evidence that the plaintiff ever

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knew of the existence of the stub. No payment of interest was made upon the note during the lifetime of the maker. The referee found that the note was given for a valuable consideration. Mr. Strong sold the note to the plaintiff for \$19,000, taking his note, payable in one year after date. What that date was did not appear. Mr. Strong testified at the trial that he still held the note. Mr. Strong was one of the executors. Further facts appear in the opinion. The plaintiff had judgment at the trial, which was reversed at the General Term.

Irving Browne, for appellant. The stub was no part of the note. 2 Pars. on Notes and Bills, 546. It was proper for Mr. Cornell to attach such value to the services of Strong as he pleased, and to give a note for such amount. *Worth v. Case*, 42 N. Y. 362; *Earl v. Peck*, 64 id. 596. The note having been executed for value, and it appearing to have been reasonable in amount, the doctrine of constructive fraud will not apply, and plaintiff was not bound to show the fairness of its execution and delivery, or that it had not been paid. 1 Pars. on Notes and Bills, 175; *Burnham v. Allen*, 1 Gray, 500; *Cheslyn v. Dalby*, 2 Y. & C. 195, 196. In cases of natural relationship the law does not apply the doctrine of constructive fraud, and impose on the claimant the burden of showing the fairness and good faith of the transaction. *Jenkins v. Pye*, 12 Pet. 253; *Hunter v. Atkins*, 2 M. & K. 113; *Howe v. Howe*, 99 Mass. 88; *Sausley v. Jackson*, 16 Tex. 584; *Beauland v. Bradley*, 2 S. & G. 339.

John Thompson, for respondents. Plaintiff was bound to show that the note in suit was not procured by any undue influence the donee might have exercised by reason of his fiduciary relations. *Hoghton v. Hoghton*, 11 L. & Eq. 138; *Cooke v. Lamotte*, 2 L. J. (N. S.) Ch. 371; *Gibson v. Jeyes*, 6 Ves. 266; *Huguenin v. Basely*, 14 id. 273; 9 J. R. 253; *Nesbit v. Lockman*, 34 N. Y. 167; *Sears v. Shafer*, 2 Seld. 268; *Brock v. Barnes*, 40 Barb. 521; *Crispel v. Du Bois*, 4 id. 393. The note in suit was not the subject of a valid gift by the maker. 1 Story's Eq. Jur., § 256; *Harris v. Clark*, 3 N. Y. 112; *Pearson v. Pearson*, 7 J. R. 26; *Fink v. Cox*, 18 id. 145; *Phelps v. Pond*, 23 N. Y. 74, 78; 28 Barb. 130, 137. As the law prevented the deceased from executing any paper in favor of his confidential agent, and the latter from receiving it, the note never had any existence and could not be made valid by assignment. 14 Ves.

289; Bateman on Com. Law, 19, 20, §§ 5, 6; 1 Story Eq. Jur., §§ 218, 308, 310, 311, 315, 328; *Ingersoll v. Roe*, 65 Barb. 346; *Loomis v. Ruck*, 56 N. Y. 462.

HAND, J. (Omitting *obiter* remarks.)

The majority of the general term put their reversal of the judgment upon the ground that it conclusively appeared from the stub attached that the note was intended as a gift and was without consideration. In this I am unable to concur.

The referee's finding that the note was delivered not as a gift but for a valuable consideration has some evidence to support it, in the proof of the services rendered by Strong to the deceased and his abandonment of a profession at the request of the deceased, in the intention expressed by the latter to make some compensation for those services, and the conversation had with his counsel not very long before the date of this note, in which he was dissuaded from making this compensation by will and advised to do it while alive, to which he assented. What appears upon the stub is not in my opinion conclusive against this result.

There is perhaps difficulty in giving any entirely satisfactory construction to this memorandum made by the deceased, but the interpretation of the general term seems to my mind inconsistent with the known facts of the case. Strong certainly had had and the deceased knew that he had had property of the value of \$32,000 given him before the date of this note, and perhaps \$30,000 more in bonds. The \$20,000 note could not have been therefore as the general term supposes a gift to make him equal in gifts with his cousin Charles to whom only \$20,000 had been given in all.

But not only do the circumstances show that the memorandum could not mean that this gift of the \$20,000 to Strong would make his equal in gifts to Charles, but the memorandum itself does not say so. Its language is "to make the amount the same as Chas. W. Cornell." While, as has already been said, there is probably insuperable difficulty in discovering precisely all that the deceased meant by this expression, its intrinsic sense is merely that the amount of this note \$20,000 is so fixed to make it the same as an amount possessed in some way by Charles, and this is consistent with both amounts being gifts, or the one being fixed upon in the testator's mind as a fair compensation for Strong's services and at the same time equal to an amount he had given or intended to give to Charles.

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On the whole I think this memorandum was a piece of evidence to be submitted with the other evidence to be considered by the referee on the question of fact. His decision upon all this evidence cannot be disturbed by this court.

The same may be said of the proof of large gifts to Strong either all before, or some before and some after the date of the note.

The reversal by the general term is not stated to be upon the facts, and on the argument it was conceded by the counsel for the respondents to be upon the law merely. It may be that a finding upon all the evidence that the note was without consideration and a gift would not be disturbed, and would be held by us as not unauthorized by the evidence. On the other hand we cannot accede to the proposition that a finding to the contrary, such as has been made by the referee here, must by reason of the contents of this stub or other testimony be reversed as erroneous in law.

It follows, that except as bearing upon undue influence and the relations of parties hereafter considered, the inadequacy of the services or the extravagance of the compensation are not material. That was a matter purely of agreement between Strong and the deceased and with which the court will not interfere under ordinary circumstances. *Earl v. Peck*, 64 N. Y. 597; *Worth v. Case*, 42 id. 362; *Johnson v. Titus*, 2 Hill, 606. Although the consideration of a promissory note is always open to investigation between the original parties (and we agree with the court below that the plaintiff here has no better position than Strong himself), yet as pointed out by the chief judge in *Earl v. Peck*, *supra*, mere inadequacy in value of the thing bought or paid for is never intended by the legal expression, want or failure of consideration. This only covers either total worthlessness to all parties or subsequent destruction partial or complete.

Assuming then, as I think we must, that there was no error as matter of law in the finding of the referee that this note was given for a valuable consideration, and that the adequacy of that consideration is something with which we have no concern if the parties dealt on equal terms, the only point remaining to consider is the relations existing between the deceased and Strong at the date of the note.

It is insisted strenuously by the learned counsel for the respondents that these were such as to call for the application of the doctrine of constructive fraud, and throw upon the plaintiff the burden of proving not only that the deceased fully understood the act, but that he

was not induced to it by any undue influence of Strong, and that the latter took no unfair advantage of his superior influence or knowledge.

The court below were hardly correct in the suggestion that the plaintiff conceded this burden to be upon himself, and for that reason, instead of resting upon the statement of consideration in the note, gave evidence in opening his case of an actual consideration; for this may have been done to show, in the first instance, that the note was not a gift, and hence, void under the law applicable to gifts. Indeed, it appears from the findings and refusals to find, and the opinion of the referee, that such was not the theory upon which the action was tried or decided.

We return, then, to the question whether this case was one of constructive fraud. It may be stated as universally true that fraud vitiates all contracts, but as a general thing it is not presumed, but must be proved by the party seeking to relieve himself from an obligation on that ground. Whenever, however, the relations between the contracting parties appear to be of such a character as to render it certain that they do not deal on terms of equality, but that either on the one side, from superior knowledge of the matter derived from a fiduciary relation or from overmastering influence, or on the other, from weakness, dependence, or trust justifiably reposed, unfair advantage in a transaction is rendered probable, there the burden is shifted, the transaction is presumed void, and it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was fair, open, voluntary and well understood. This doctrine is well settled. *HUNT, J., Nesbit v. Lockman*, 34 N. Y. 167; *Story's Eq. Jur.*, § 311; *Sears v. Shafer*, 2 Seld. 268; *Huguenin v. Basely*, 13 Vea. 105; *S. C.*, 14 id. 273; *S. C.*, 15 id. 180; *Wright v. Proud*, 13 id. 138; *Harris v. Tremenhoe*, 15 id. 40; *Edwards v. Myrick*, 2 Hare, 60; *Hunter v. Atkins*, 3 My. & K. 113. And this is, I think, the extent to which the well-considered cases go, and is the scope of "constructive fraud."

The principle referred to, it must be remembered, is distinct from that absolutely forbidding a purchase by a trustee or agent for his own benefit of the subject of a trust, and charging it, when so purchased, with the trust. That amounts to an incapacity in the fiduciary to purchase of himself. He cannot act for himself at all, however fairly or innocently, in any dealing as to which he has duties

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as trustee or agent. The reason of this rule is subjective. It removes from the trustee, with the power, all temptation to commit any breach of trust for his own benefit. But the principle with which we are now concerned does not absolutely forbid the dealing, but it presumes it unfair and fraudulent unless the contrary is affirmatively shown.

This doctrine, as has been said, is well settled but there is often great difficulty in applying it to particular cases.

The law presumes in the case of guardian and ward, trustee and *cestui que trust*, attorney and client, and, perhaps, physician and patient, from the relation of the parties itself, that their situation is unequal and of the character I have defined; and that relation appearing itself throws the burden upon the trustee, guardian or attorney of showing the fairness of his dealings.

But while the doctrine is without doubt to be extended to many other relations of trust, confidence or inequality, the trust and confidence, or the superiority on one side and weakness on the other must be proved in each of these cases; the law does not presume them from the fact for instance that one party is a grandfather and old and the other a grandson and young, or that one is an employer and the other an employee. The question as to parties so situated is a question of fact dependent upon the circumstances in each case. There is no presumption of inequality either way from these relations merely.

In the present case it cannot be said that the fact that the deceased employed Strong as his clerk to read and answer his letters and cut off his coupons, and make out his bills, or as his bailiff to collect his rents, or that at this time he was old and of defective vision, or that Strong lived near him and was his grandson, taken separately or together raise a conclusive presumption of law that their situation was unequal, and that dealings between them as to compensation for these services were between a stronger and a weaker party, a fiduciary *in hac re* and the party reposing confidence. These relations as a matter of fact may have led to or been consistent with controlling influence on the part of the grandson or childish weakness and confidence on the part of the grandfather, but this was to be shown and is not necessarily derivable or presumable from the relations themselves, as in the case of trustee, attorney or guardian.

From these relations and the large gifts shown from the deceased to Strong, and from the extravagant amount of the compensation in the note, it is very possible the referee might have found as a fact

the existence of weakness on the one side, or undue strength on the other, which rendered applicable the doctrine of constructive fraud and threw upon the plaintiff the burden of disproving such fraud. These circumstances may have well been of a character, if not sufficient to shift the presumption, at least to authorize a setting aside of a contract without any decisive proof of fraud, but upon the slightest proof that advantage was taken of the relation, or of the use of "any arts or stratagems or any undue means or the least speck of imposition." *Whelan v. Whelan*, 3 Cow. 538; Ld. ELTON, L. C.; *Harris v. Tremenheere*, 15 Ves. 40; Ld. BROUGHAM, *Hunter v. Atkins*, 3 My. & K. 135.

But the referee not only has not found as fact any inequality in the situation of the deceased and Strong, but refused to find as matter of law its existence, and there is really no evidence whatever of any arts or stratagems or "speck of imposition" on the part of Strong as to this note.

We are not permitted to supply these findings even if we thought them proper for the referee to make, nor can we sustain a reversal of the original judgment upon facts not found and not necessarily inferable from uncontradicted evidence in the case, the general term not having in any way interfered with the findings of the referee.

On the whole, therefore, we reach the conclusion that there was no good reason for disturbing the judgment of the referee.

[Omitting an *obiter* remark.]

The order granting a new trial must be reversed, and judgment for plaintiff affirmed, with costs.

All concur, except MILLER and EARL, JJ., absent.

Judgment accordingly.

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(73 N. Y. 103.)

Marriage—assumption by married woman as grantee of mortgage on granted premises.

A married woman, by the terms of a deed to her, assumed and agreed to pay a mortgage existing upon the conveyed premises. *Held*, that this made her personally liable for the mortgage debt, and that her grantee, in like manner assuming the mortgage, was likewise liable, and a judgment against him for deficiency on foreclosure was proper. (See note, p. 445.)

ACTION to foreclose a mortgage executed by Simon to plaintiff. Simon conveyed the premises to Kate M. Cormac, a married woman, by deed, expressly subject to the mortgage, which the grantee assumed and agreed to pay as part of the consideration-money. Mrs. Cormac subsequently conveyed the premises to defendants by deed, containing a similar clause. A judgment was asked against defendants for deficiency, but the court held that defendants were not personally liable, and that plaintiff was not entitled to a judgment for deficiency against them.

Jacob F. Miller, for appellant.

Geo. C. Holt, for respondents. If Mrs. Cormac was not personally liable for the payment of the mortgage defendants were not. *King v. Whitey*, 10 Paige, 465; *Trotter v. Hughes*, 12 N. Y. 74; *Vrooman v. Turner*, 69 id. 280; *S. C.*, 25 Am. Rep. 195. Mrs. Cormac being a married woman was not liable personally to pay the mortgage. *Yale v. Dederer*, 18 N. Y. 265; 22 id. 450; 68 id. 329; *Nash v. Mitchell*, 71 id. 199; *S. C.*, 27 Am. Rep. 38. A debt incurred by a married woman on the purchase of property on credit was not enforceable at common law against her separate estate as having been for its benefit. *Co Litt. 3 a*; *Schmidt v. Costa*, 3 Abb. Pr. (N. S.) 188; *Robinson v. Rivers*, 9 id. 144; *White v. McNett*, 33 N. Y. 371; *Knapp v. Smith*, 27 id. 277; *Ledeliey v. Powers*, 39 Barb. 555; *Baken v. Harder*, 6 T. & C. 440; *Kinne v. Kinne*, 45 How. Pr. 61. A married woman who executes a bond secured by a mortgage upon her separate real estate is not, in the absence of special

circumstances bringing the contract within the statutory exceptions, liable for a deficiency on foreclosure. *Payne v. Burnham*, 62 N. Y. 74; *Manhattan Life Ins. Co. v. Glover*, 14 Hun, 153; *Kidd v. Conway*, 65 Barb. 158; *Brown v. Hermann*, 14 Abb. Pr. 394. The burden of proof was upon plaintiff to show affirmatively by competent evidence that Mrs. Cormac's acceptance of the deed from Simon made her personally liable to pay the bond. *Hallock v. De Munn*, 2 T. & C. 350; *Kidd v. Conway*, 65 Barb. 158; *Nash v. Mitchell*, 71 N. Y. 199; *S. C.*, 27 Am. Rep. 38; *Manhattan Life Ins. Co. v. Glover*, 14 Hun, 153. To maintain an action on a promise made by one person for the benefit of a third person, it must be shown that the promisee was under a legal obligation to the third party. *Vrooman v. Turner*, *supra*; *Garnsey v. Rogers*, 47 N. Y. 233; *S. C.*, 7 Am. Rep. 440; *Merrill v. Green*, 55 id. 270.

ANDREWS, J. This court, in *Vrooman v. Turner*, 69 N. Y. 280; *S. C.*, 25 Am. Rep. 195, affirmed the doctrine of *King v. Whitely*, 10 Paige, 465, that where a grantor of an equity of redemption in mortgaged premises is not personally liable to pay the mortgage debt, and has no legal or equitable interest in such payment, except so far as the mortgage may be a charge upon the lands mortgaged, his grantee thereof incurs no liability to the holder of the mortgage by reason of a covenant on his part contained in the deed, to assume and pay the mortgage. The grounds of this doctrine are fully stated in the opinion in the cases cited, and need not be here adverted to. The defendants claim the benefit of the rule, and they were, by the judgment of the court below, exonerated from liability for the deficiency arising on the foreclosure sale in this action, on the ground that Mrs. Cormac, their grantor, was not personally bound or liable to pay the plaintiff's mortgage. The mortgage was executed by one Simon to the plaintiff in 1872, to secure the payment of his bond for \$20,000. In 1873, Simon, the owner of the equity of redemption in the mortgaged premises, conveyed them by deed to Kate M. Cormac, a married woman, for the consideration as expressed in the deed of \$31,000, subject to the mortgage which she as grantee by the terms of the deed assumed, and agreed to pay as a part of the consideration of the conveyance.

In 1874 Mrs. Cormac, together with her husband deeded the premises to the defendants, subject to the mortgage, which they in turn assumed and agreed to pay.

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It was not shown upon the trial that Mrs. Cormac when she purchased the land had any separate estate, or that she was engaged in any trade or business on her own account or otherwise. The purchase comprised four city lots, but it does not appear for what purpose they were bought, whether for use or resale. The finding of the court that Mrs. Cormac was not personally liable to pay the plaintiff's mortgage, notwithstanding her express agreement, contained in the conveyance from Simon, was put upon the ground that a married woman has no general capacity under the acts of 1848, 1849, 1860 and 1862, to bind herself by a contract to pay the purchase-price of land bought by, and conveyed to her, and that her common-law disability attaches to and makes her contract void, unless it appears that the purchase was made, and the liability incurred in the prosecution of a trade or business, carried on by her, on her separate account, and that to charge her estate in equity for the debt, there must have been an antecedent separate estate capable of being charged, and the intention to charge it expressed in the contract, or the consideration must be one going to the direct benefit of such estate.

The question presented is one of considerable importance, and not free from difficulty. The case of *Yale v. Dederer*, 18 N. Y. 265 ; 22 Bl. 450, arose under the acts of 1848 and 1849, and it was determined in that case, that the statutes then under consideration did not remove the common-law disability of a married woman to contract debts, or bind herself by a personal obligation, and that her engagements in any case, could only be enforced by way of equitable charge upon her separate estate, and that such charge could only be created by an intention declared in the contract, which is the foundation of the charge, or when the contract was for the direct benefit of her estate ; and it was held that her estate was not charged by the execution of a promissory note, which she had signed in the ordinary form of such a contract, as surety for her husband. The construction put upon the acts of 1848 and 1849, in *Yale v. Dederer*, has been followed in other cases, and the decision in that case is controlling as to the construction of these statutes, and in respect to cases coming within the same principle.

It is difficult to hold in view of the decision in *Yale v. Dederer* that under the acts of 1848 and 1849, the contract of a married woman to pay for land purchased by her is valid, either in law or equity, or enforceable against her estate, when she receives no other

benefit from the transaction than the benefit implied from the acquisition of the title to the land purchased, at least when the land purchased constitutes her entire estate. This view of these statutes does not however involve the injustice of allowing a married woman to obtain the title to land upon a promise to pay the purchase-price, and then to hold it free from any claim or lien for the purchase-money. Upon the well-settled doctrine of equity, if her bond or other security for the payment of the consideration is void the land would be subjected upon principles quite independent of any doctrine appertaining to the separate estates of married women to a lien in favor of the vendor for the unpaid purchase-money. The act of 1848, as amended in 1849, so far as it authorized a married woman to take by gift or grant, from any person other than her husband real or personal property, was not an enabling statute. This capacity she had at common law. *Darby v. Callaghan*, 16 N. Y. 71; *Knapp v. Smith*, 27 id. 278. The new capacity given to a married woman by that act was to hold the estate or property acquired by her in any of the modes designated therein as her separate property without the creation of a trust, or the intervention of trustees, free from the control or power of disposition of the husband with the right to convey and devise it as if she were a *feme sole*.

In *Huyler's Exrs. v. Atwood*, 26 N. J. 504; S. C., 28 id. 275, a case almost identical in its facts with this, the same question arose as to the liability of the grantees of a married woman who, in the conveyance to them, had assumed the payment of a mortgage on the land, which she had likewise assumed in the conveyance from her grantor, to pay a deficiency arising on the foreclosure of the mortgage.

The third section of the New Jersey statute of 1852 relating to married women is in nearly the same words as the same section of our statute of 1848, and the court affirmed the liability of the defendants for the deficiency upon the ground that the covenant of their grantor to assume and pay the mortgage in the conveyance to her was valid, notwithstanding her coverture and the conclusion as to the validity of her covenant was reached, upon the ground that the legislature by giving to married women the capacity to acquire real estate by grant, impliedly authorized them to enter into a contract of purchase and to bind themselves to pay the purchase-money.

The limited construction put upon our statute in *Yale v. Dedere* would not probably justify us in adopting, in its full extent, the

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view of the New Jersey court; but this court, in *Ballin v. Dillaye*, 37 N. Y. 35, which arose under the acts of 1848 and 1849 and 1860, went very far towards holding a married woman liable on her bond given on her purchase of land for the payment of the purchase-money. In that case the question was whether the defendant Mrs. Dillaye, a married woman, was liable on her bond for a deficiency upon a foreclosure of a mortgage executed by her to the plaintiffs. She obtained title to the premises by purchase at a foreclosure sale of a mortgage held by a bank. The plaintiffs at the time held a junior mortgage on the same premises, and intended upon the sale to bid to the extent of their mortgage. Mrs. Dillaye wished to prevent their bidding. A written agreement was accordingly executed between her and the plaintiffs, by which, in substance, the plaintiffs agreed to advance \$7,000 to clear the title and not to bid at the sale; and she agreed to recognize their mortgage as valid, and to give them, on her purchasing the premises, her bond and mortgage on part of the premises to secure the payment of their mortgage debt and the \$7,000 advanced. Pursuant to the agreement the plaintiffs advanced the money and refrained from bidding and the defendant bought the premises and executed to them a bond and mortgage covering the advance and the amount of their original mortgage. On the trial of the question of Mrs. Dillaye's liability for the deficiency the plaintiffs offered to prove that at the time of the transaction she had a separate estate. There was no offer to prove, nor did it appear, that Mrs. Dillaye had any interest in the mortgaged premises prior to her purchase on the foreclosure of the bank mortgage, or that her antecedent separate estate was pledged for the mortgage debt or had any relation to the mortgaged premises. The special term rejected the proof offered and held that the defendant was not liable for the deficiency, and the decision of the special term was affirmed by the general term. This court reversed the judgment and directed a new trial.

It is a little difficult to ascertain the precise ground upon which the decision in this court proceeds. The court in reference to the fact that Mrs. Dillaye had a separate estate, say that it was relevant and material, and in view of the offer on the trial to prove the fact, it is assumed in the consideration of the case. But I do not understand that her liability is put upon the ground that she had a separate estate at the time of the purchase; certainly it was not put upon this ground alone. It is not perceived how Mrs. Dil-

laye's liability at law or in equity for the deficiency, could be affected by the fact that she had a separate estate at the time of the transaction, unless it was connected by contract or otherwise with the property purchased. But the court seem to hold, that as she by the purchase on the foreclosure of the bank mortgage, acquired not only the property included in the plaintiff's mortgage, but other lots in addition, the obligation entered into by her was for the benefit of her estate, and that her whole estate was therefore chargeable with the deficiency.

It is claimed on the part of the plaintiff that the case of *Ballin v. Dillaye*, decides in his favor the question now presented. But without considering whether the circumstances under which the bond in that case was given, distinguish it in principle from this, I am of opinion that the covenant of the defendant's grantee to assume and pay the Simon mortgage, was binding and valid, on the ground that under the acts of 1860 and 1862 in connection with the previous acts, a married woman may purchase property on credit, and bind herself by a contract to pay the purchase-money, and that it is not a material circumstance in respect to her liability, whether she had any antecedent separate estate, or whether the contract on her part was a prudent, wise and advantageous one.

The act of 1860 greatly enlarged the civil capacity of a *feme covert*, beyond what was conferred by the previous legislation. By the second section she is empowered to bargain, sell, assign and transfer her separate property, and carry on any trade or business, and perform any labor or services on her sole and separate account. The third section authorizes a married woman possessed of real estate as her separate property to bargain, sell and convey the same, or to enter into any contract in reference thereto, with the assent in writing of her husband, or by the authority of the court, obtained as provided in the section. The seventh section provides that she may sue and be sued in all matters having relation to her separate property, or in relation to property which might thereafter come to her by descent, devise, bequest, or the gift of any person except her husband in the same manner as if she were sole.

The eighth section declares that the husband shall not be bound by any bargain or contract of the wife, "in respect to her sole or separate property, or any property which may hereafter come to her by descent, devise, bequest, or the gift of any person, except her husband," or by any bargain or contract entered into by her in or

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about the carrying on of any trade or business, under any statute of the State, or render him or his property in any way liable therefor.

The authority given to a married woman by this statute to carry on any trade or business, on her own account, and to have and control her own earnings, whether living with her husband, or living separate from him, worked a radical change in the pre-existing law, and it has been held by this court, in several cases, that as incident to her authority under this statute to carry on a trade or business, a married woman may enter into any contract in respect thereto. She may purchase real or personal property on credit for the purposes of the trade or business into which she is about to enter, and bind herself by contract of payment, and also by her contracts made in the course of the business in which she engages. *Bodine v. Killeen*, 53 N. Y. 93; *Frecking v. Rolland*, id. 423. In the case last cited, it was said: "The power to carry on a separate trade or business includes the power to borrow money, and to purchase upon credit, implements, fixtures and real or personal estate, necessary or convenient for the purpose of commencing it, as well as the power to contract debts in its prosecution, after it has been established."

The limitation upon the power of a married woman to deal with her real estate, contained in the third section of the act of 1860, which made the assent of her husband, or the order of the court necessary to the validity of her conveyance of her lands, or her contracts in respect thereto, was removed by the amendment of 1862, and a clause was added to the section expressly authorizing her to enter into any of the usual covenants for title, in her contracts in relation to, or her conveyances of her real property, which covenants the section declares shall be obligatory to bind her separate property.

It will be observed that these statutes confer upon a married woman the broadest and most comprehensive powers over her separate real and personal property. Her power of disposition is absolute and unqualified. She may sell or give it away. She may enter into any contract in respect to her separate real property "with the same effect, and in all respects as if she were unmarried," and this court has held that as incident to her separate ownership, she is liable for torts committed in its management, and for the fraud of her agent in dealing with third persons in respect to it. *Rowe v. Smith*, 45 N. Y. 230; *Baum v. Mullen*, 47 id. 577. She may engage in business, and incur the most dangerous and even ruinous liabilities in its prosecution, and they will be enforced against her to the same extent

as if she was unmarried. She is no longer regarded as under the tutelage of the court, but the new legislation assumes that she is capable of managing her own interests

But it is insisted that she may not bind herself by a contract for the purchase of land, if she has no antecedent estate to be benefited, or if the purchase is not made for the purposes of a trade or business. The policy of such special limitation in view of the general scope of our statutes, and the conceded power of married woman to charge and dispose of their property, and incur liabilities in its management, is not apparent.

In *Stewart v. Jenkins*, 6 Allen, 300, the Supreme Court of Massachusetts, under a statute of that State which provides "that a married woman may bargain, sell and convey her separate real and personal property, enter into any contract in reference to the same, carry on any trade and business and perform any labor and services on her sole and separate account, and sue and be sued in all matters having relation to her separate property, etc., as if she were sole," held that a married woman was bound by a note given as the consideration in part of a conveyance of real estate, on the ground that it was a contract in reference to her separate estate within the statute, and the court rejected as too narrow, the construction insisted upon by the defendant, that the power given to a married woman by the statute to enter into a contract in reference to her separate estate was limited to the estate owned by her when the contract was made.

The section of the Massachusetts statute considered in *Stewart v. Jenkins*, is very nearly like the third section of our statute of 1860 as amended in 1862. But the intention of the legislature to confer upon a married woman, the general capacity to enter into a valid executory contract to pay for property purchased by her, is indicated by the seventh and eighth sections of the act of 1860, as amended in 1862. The seventh section of the act of 1860 was amended by the act of 1862, by inserting the word *purchase*, in the first clause of the section, so that it should read: "Any married woman may while married, sue and be sued in all matters having relation to her sole and separate property, or which may come to her by descent, devise, bequest, *purchase*," etc., and the eighth section was amended by inserting the same word in that section, so as to embrace in the exemption of the husband, exemption from liability on the contracts of the wife made in respect to property coming to her by purchase

These amendments indicate that the legislature had in view the

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acquisition by a married woman of the title to property by purchase, and the clear implication from the provision in the eighth section, exempting the husband from liability upon the wife's contracts or bargains, in respect to property purchased by her, is that she may bind herself personally by such contracts; and a contract to pay the consideration of land conveyed to her, is, I think, a contract in respect to property coming to her by purchase within the meaning of the statute.

The conclusion is that under the statutes as they now exist, a married woman, as incident to her right to acquire real and personal property by purchase and hold it to her sole and separate use, may purchase property upon credit, and bind herself by an executory contract to pay the consideration-money, and that her bond, note, or other engagement, given and entered into to secure the payment of the purchase-price of property acquired and held for her separate use, may be enforced against her in the same manner and to the same extent as if she was a *feme sole*, and that her liability does not depend upon the proof or existence of special circumstances, but is governed by the ordinary rules, which determine the liability of persons *sui juris*, upon their contracts.

The judgment should be reversed, and a new trial ordered.

All concur, except MILLER and EARL, JJ., absent at argument.

NOTE BY THE REPORTER.—In *Donovan's Appeal*, 41 Conn. 551, it was held that the estate of a deceased married woman was liable in equity for money borrowed by her for the purchase of land in her own name, although no obligation had been given for the loan. And in *Adams v. Currier*, 46 id. 551, a married woman was held liable upon a note executed by herself and her husband for the price of a carriage purchased by her for her own use and upon her own credit, although it did not charge her separate estate, and it did not appear that she had any at the time. It was also held that the declaration need not allege the coverture and the facts necessary to render the defendant liable as a married woman.

In *Messer v. Smith*, to appear in 58 N. H., the Supreme Court of New Hampshire held as follows: A note of a married woman, given by her for the price of land bought by her at the time of the conveyance, is a contract made by a "married woman holding property in her own right, in respect to such property," within the meaning of Gen. Stats., ch. 164, § 13; and her mortgage of the same land, made at the same time, to secure the note, is valid. A contract by which a married woman acquires separate property is a contract made by her in respect to her separate property. *Stewart v. Jenkins*, 6 Allen, 306; *Eastabrook v. Earle*, 97 Mass. 302, 303; *Lobares v. Colby*, 99 id. 559, 560; *Gordon v. Dix*, 106 id. 305, 306; *Faucett v. Currier*, 109 id. 79, 81; *Hoburn v. Warner*, 112 id. 271, 273; *Glass v. Warwick*, 40 Penn. St. 140; *Pemberton v. Johnson*, 46 Mo. 342; *Balla v. Dillaye*, 37 N. Y. 85, 89; *Huyler v. Atwood*, 26 N. J. Eq. 504; *S. C.*, 28 id. 275; *Sykes v. Chadwick*, 18 Wall. 141, 145, 147, 148; 2 Perry on Trusts, § 686. A contract of purchase, though not the only mode, is a common mode of acquiring property. Legal capacity to make such contract is, in general, a material and fundamental part of the power of making contracts in respect to property. A purchase of property is an exercise of the power of making contracts in respect to it. Of a theoretical system or series of contracts respecting a piece of property, the purchase of it is the first in natural order; and practically the purchase of it is

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often the contract without which the power of making other contracts in respect to it would be inoperative and worthless. A person's capacity to make, in respect to his property, any contract except the contract of purchase so often necessary for acquiring it, would be a general and comprehensive power with an extraordinary exception. And to supply such an exception by implication would be a construction not in harmony with the liberating purview of the statute.

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(75 N. Y. 124.)

Gift — savings bank deposit.

S. deposited in a savings bank moneys belonging to her, in trust for M. and K., who were her distant relatives. She retained the pass-books until her death, drawing out only one year's interest, and M. and K. were ignorant of the deposit. *Held*, that the transaction constituted an effectual trust for their benefit, on the death of S. (*See now*, p. 458.)

ACTION to recover bank deposit. The opinion states the case. The plaintiff had judgment below.

Nehemiah Millard, for appellants. No gift was established. *Irish v. Nutting*, 47 Barb. 370; *Grymes v. Hone*, 49 N. Y. 17. No valid trust existed because the depositor retained possession, means of possession and dominion over the property while she lived, and the *cestuis que trust* were ignorant of the deposits until after her death. *Wall v. Prov. Inst. for Svs.* 3 Al. 96; *Minchin v. Merrill*, 2 Edw. Ch. 333; *Howard v. Windham Co. Svs. Bk.* 40 Vt. 597; *Para. on Con.* (5th ed.), ch. 15, § 1; *Curry v. Powers*, 70 N. Y. 212; *S. C.*, 26 Am. Rep. 577; *Brabrook v. Boston F. C. Svs. Bk.* 104 Mass. 228; *Clark v. Clark*, 108 id. 522. Mere declarations of intending to make a gift in future cannot constitute one *inter vivos*. *Little v. Willets*, 55 Barb. 125; *Harris v. Clark*, 3 N. Y. 93; *Noble v. Smith*, 2 Johns. 52; *Grangiac v. Arden*, 10 id. 293; *Cook v. Husted*, 12 id. 188; *Bedell v. Carll*, 33 N. Y. 581; *Gray v. Barton*, 55 id. 68, 73; *S. C.*, 14 Am. Rep. 181; *Shuttleworth v. Winter*, id. 624; *Brink v. Gould*, 43 How. 289; *Johnson v. Spier*, 5 Hun, 468. To constitute a valid gift *inter vivos*, delivery or some act equivalent to it is essential. *Gray v. Barton*, 55 N. Y. 68, 73; *S. C.*, 14 Am. Rep. 181; *Shuttleworth v. Winter*, id. 624; *Noble v. Smith*, 2 Johns. 52; *Grangiac v. Arden*, 10 id. 293; *Cook v. Husted*, 12 id. 188; *Bedell v. Carll*, 33

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N. Y. 581; *Brink v. Gould*, 48 How. 289; *Johnson v. Spier*, 5 Hun, 468. The retention of dominion over the deposits was fatal to the theory of a gift. 2 Kent's Com. 489; *Geary v. Page*, 9 Bosw. 290; *Gilchrist v. Stevenson*, 9 Barb. 9-13; *Harris v. Clark*, 3 Comst. 113; *Hitch v. Davis*, 3 Md. Ch. Dec. 266; *Huntington v. Gilmore*, 14 Barb. 243, 246; *Fiero v. Fiero*, 5 T. & C. 151; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Harris v. Clark*, 3 N. Y. 93. To give validity to a declaration of trust the grantor or donor must have absolutely parted with his interest in the property and put such interest beyond his own reach. *Warriner v. Rogers*, 1873, Eng. L. R. 16 Eq. 340; *Jones v. Locke*, Eng. L. R. 1 Ch. 25; *Gray v. Hackett*, 12 Gray, 227; Hills' Treatise on Law Relating to Trustees, 83; *Coleman v. Sarell*, 3 Bro. C. C. 12; *Ellison v. Ellison*, 6 Ves. 656; *Antrobus v. Smith*, 12 Ves. 39; *Edwards v. Jones*, 1 M. Cr. 226; *Dillon v. Coppin*, 4 id. 647; *Bunn v. Winthrop*, 1 Johns. Ch. 329; *Hayes v. Kershow*, 1 Sandf. Ch. 258; *Minturn v. Seymour*, 4 Johns. Ch. 173; *Acker v. Phœnix*, 4 Pai. 308; Hill on Trustees, 85; *Forest v. Forest*, 34 L. J. Ch. 428; *Roberts v. Roberts*, 11 Jur. (N. S.), 992.

M. W. Divine, for respondent.

CHURCH, Ch. J. The facts in this case are substantially undisputed, as found by the judge before whom the case was tried: The intestate, Mrs. Boone, in 1866, deposited in the Citizens' Savings Bank \$500, declaring at the time that she wanted the account to be in trust for Lillie Willard, who is the plaintiff. The account was so entered, and a pass-book delivered to the intestate, which contained these entries: "The Citizens' Savings Bank in account with Susan Boone, in trust for Lillie Willard. 1866, March 23. \$500."

A deposit of the same amount, and in the same manner, was made in trust for Kate Willard now Mrs. Brown. This money belonged to the intestate at the time of the deposits. The plaintiff and Mrs. Brown are sisters, and were at the time, of the age respectively of eighteen and twenty, and were distant relatives of the intestate, their mother being a second cousin. The intestate retained possession of the pass-books until her death in 1875, and the plaintiff and her sister were ignorant of the deposits until after that event. The money remained in the bank with its accumulated interest until the death of the intestate except that she drew out one year's interest. Mrs. Brown assigned to the plaintiff her interest in the deposit purporting

to have been made for her benefit, and the action is brought against the administrator of the intestate and the bank for the delivery of the pass-books and the recovery of the money. The question involved has been very much litigated, and many refinements may be found in the books in respect to it. Many cases have been found difficult of solution, not so much on account of the general principles which should govern, as in applying those principles to a particular state of facts. It is clear that a person *sui juris*, acting freely and with full knowledge has the power to make a voluntary gift of the whole or any part of his property, while it is well settled that a mere intention, whether expressed or not is not sufficient, and a voluntary promise to make a gift is *nudum pactum*, and of no binding force. *Kekewich v. Manning*, 50 Eng. Ch. 175, and cases cited. The act constituting the transfer must be consummated, and not remain incomplete, or rest in mere intention, and this is the rule whether the gift is by delivery only, or by the creation of a trust in a third person, or in creating the donor himself a trustee. Enough must be done to pass the title, although when a trust is declared, whether in a third person or the donor, it is not essential that the property should be actually possessed by the *cestui que trust*, nor is it even essential that the latter should be informed of the trust. In *Milroy v. Lord*, 4 DeGex, F. & J. 264, Lord Chief Justice TURNER, who adopted the most rigid construction of trusts, in delivering an opinion against the validity of the trust in that case, laid down the general principles as accurately perhaps as is practicable. He said: "I take the law of this court to be well settled, that in order to render a voluntary settlement valid and effectual the settler must have done everything which according to the nature of the property comprised in the settlement was necessary to be done in order to transfer the property, and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intended to provide, and the provision will then be effectual, and it will be equally effectual if he transfer the property to a trustee for the purposes of the settlement, or declare that he himself holds it in trust for those purposes, and if the property be personal, the trust may, I apprehend be declared either in writing or by parol."

The contention of the defendant is that the transaction did not transfer the property, and that there was no sufficient declaration of trust, and that by retaining the pass-books the intestate never parted

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with the control of the property. If what she did was sufficient to constitute herself a trustee, it must follow that whatever control she retained would be exercised as trustee, and the right to exercise it would not be necessarily inconsistent with the completeness of the trust. The question involving substantially the same facts has been several times before different courts of the State, and in every instance the transaction has been sustained as a good gift.

The case of *Wetzel*, before Surrogate BRADFORD, and *Millspaugh v. Putnam*, 16 Abb. Pr. 380, were deposits in the same form, and in the former the *cestui que trust* had no notice of the deposit, and in both cases the gift was held effectual. In *Smith v. Lee*, 2 N. Y. Sup. 591, money was deposited with the defendant and a note taken payable to the depositor for another person, and it was held that the depositor constituted himself a trustee. The case of *Kelly v. Manhattan Institution for Savings* (not reported) was a special term decision of the New York Common Pleas before ROBINSON, J., where precisely such a deposit was made as in this, and it was upheld as an absolute gift. These decisions, although not controlling upon this court, are entitled to respect, and they show the tendency of the judicial mind to give these transactions the effect which on their face they import. So in *Minor v. Rogers*, 40 Conn. 512; *S. C.*, 16 Am. Rep. 69, a similar deposit was upheld as a declaration of trust. PARK, J., noticed the point urged there as here of the retention of the pass-book and said: "She retained possession, therefore, because the deposit was made in her name as trustee, and not because she had not given the beneficial interest of the deposit to the plaintiff;" and in that case the depositor had drawn out the deposit and the action was sustained against her administrator. So in *Ray v. Simmons*, 11 R. I. 266; *S. C.*, 23 Am. Rep. 447, the facts were precisely like the case at bar except that the *cestui que trust* was informed of the gift and the court held the trust valid.

But the Supreme Court of Massachusetts, in two cases, *Brabrook v. Five Cent Savings Bank*, 104 Mass. 228, and *Clark v. Clark*, 108 id. 522, seem to hold a different doctrine. In the first case the circumstances were deemed controlling, adverse to an intent to create a trust, and in the last, which was similar in its facts to this, the court express the opinion that the trust was not complete, but without giving any reasons for the opinion. The last decision, although entitled to great respect, is exceptional to the general current of authority in this country.

In the English courts I do not find any case where these precise facts appeared, but the cases are numerous where the general principles have been elaborately discussed and applied to particular facts. It is only deemed necessary to refer to a few of them. In *Richardson v. Richardson*, L. R. 3 Eq. Cas. 684, it was held that an instrument executed as a present and complete assignment (not being a mere contract to assign at a future day) is equivalent to a declaration of trust. *Morgan v. Malleson*, L. R. 10 Eq. Cas. 475, was decided upon this principle and is an extreme case in support of a declaration trust. It appeared that the testator gave to his medical attendant the following memorandum: "I hereby give and make over to Dr. Morris, an India bond No. D 506, value £1,000, as some token for all his very kind attention to me during my illness." This was held to constitute the testator a trustee for Dr. Morris of the bond which was retained by him. These cases are commented upon, and the latter somewhat criticised in *Warriner v. Rogers*, L. R. 16 Eq. Cas. 340, but Sir JAMES BACON, in delivering the opinion, substantially adheres to the general rule before stated. He requires only "that the donor or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration—should have effectually changed his right in that respect and put the property out of his power, *at least in the way of interest.*" This case was decided against the validity of the trust, mainly upon the ground that the memoranda produced were, upon their face, testamentary in character. In *Pye's Case*, 18 Ves. 140, money was transmitted to an agent in France to purchase an annuity for a lady. Owing to circumstances, which the agent supposed prevented its purchase in her name, he purchased it in the name of the principal. When the latter learned this fact he executed and transmitted to the agent a power of attorney to transfer the annuity, but before its arrival the principal died. Lord ELDON held that a declaration of trust was established.

Wheatley v. Purr, 1 Keen, 551, is quite analogous to the case at bar. A testatrix directed her brokers to place £2,000 in the joint name of the plaintiffs and herself as a trustee for the plaintiffs. The sum was placed to the account of the testatrix alone, as trustee of the plaintiffs, and a promissory note was given by them to her as such trustee. The note remained in her possession until her death when her executor received the money. It was held that the transaction amounted to a complete declaration of trust.

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Mr. Hill, in his work on Trustees, after saying "that it is extremely difficult in the present state of authorities, to define with accuracy the law affecting this very intricate subject," lays down the following as the result: "When the author of the voluntary trust is possessed of the legal interest in the property, a clear declaration of trust contained in, or accompanying a deed or act which passes the legal estate, will create a perfect executed trust, and so a declaration or direction by a party, that the property shall be held in trust for the object of his bounty, though unaccompanied by a deed or other act divesting himself of the legal estate, is an executed trust." Hill on Trustees, 130.

If there is a valid declaration of trust, that is sufficient of itself, I apprehend, to transfer the title, but the difficulty is in determining what constitutes such a declaration, and whether a mere formal transfer of the property, as in the case of the medical attendant, is sufficient, is a question upon which there is some difference of opinion. No particular form of words is necessary to constitute a trust, while the act or words relied upon must be unequivocal, implying that the person holds the property as trustee for another.

Let us now consider the case in hand. In form at least the title to the money was changed from the intestate individually, to her as trustee. She stated to the bank that she desired the money to be thus deposited. It was so done by her direction, and she took a voucher to herself in trust for the plaintiff. Upon these facts what other intent can be imputed to the intestate than such as her acts and declarations imported; and did they not import a trust? There was no contingency or uncertainty in the circumstances, and I am unable to see wherein it was incomplete. The money was deposited unqualifiedly and absolutely in trust, and the intestate was the trustee. It would scarcely have been stronger if she had written in the pass-book, "I hereby declare that I have deposited this money for the benefit of the plaintiff and I hold the same as trustee for her."

This would have been a plain declaration of trust, and accompanied as it was with a formal transfer to herself in the capacity of trustee would have been deemed sufficient under the most rigid rules to be found in any of the authorities. It seems to me that this was the necessary legal intendment of the transaction, and that it was sufficient to pass the title. The retention of the pass-book was not necessarily inconsistent with this construction. She must be deemed to have retained it as trustee. The book was not the property, but

only the voucher for the property which after the deposit consisted of the debt against the bank.

There are many cases where the instrument creating the trust has been retained by the author of it until his death, especially when he made himself the trustee, and yet the trust sustained. *Eaton v. Scott*, 6 Sim. 31; *Fletcher v. Fletcher*, 4 Hare, 67; *Souverye v. Arden*, 1 Johns. Ch. 240; *Bunn v. Winthrop*, id. 329. This circumstance among others has been considered upon the question of intent, but is never deemed decisive against the validity of the trust. Id.; see Hill on Trustees, *supra*. Some confusion has been created by judicial expressions that the author of such a trust must do all in his power to carry out his intention, that the nature of the property will admit of. This general proposition requires some qualification. In this case the intestate might have notified the objects of her bounty, but this is not regarded as indispensable by any of the authorities, and she might have made the deposits in their name, and delivered to them the books, or delivered to them the money. The rule does not require that the gift shall be made in any particular way, it only requires that enough shall be done to transfer the title to the property, and one of the modes of doing this is by an unequivocal declaration of trust. In *Richardson v. Richardson*, *supra*, the court in noticing this point said: "Reliance is often placed on the circumstance that the assignor has done all he can, and that there is nothing remaining for him to do, and it is contended that he must in that case only, be taken to have made a complete and effectual assignment. But that is not the sound doctrine on which the case rests, for if there be an actual declaration of trust, although the assignor has not done all that he could do, for example although he has not given notice to the assignee, yet the interest is held to have effectually passed as between the donor and donee. The difference must be rested simply on this: *aye or no*, has he constituted himself a trustee?"

As notice to the *cestui que trust* was not necessary, and as the retention of the pass-books was not inconsistent with the completeness of the act, the case is peculiarly one to be determined by this test; did the intestate constitute herself a trustee? After a careful consideration of the case in connection with the established rules applicable to the subject, and the authorities, I think this question must be answered in the affirmative. It was not done in express formal terms, but such is the fair legal import of the transaction. I

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have considered the case thus far upon what appears from the face of the transaction, without evidence *aliunde*, bearing upon the intent. It is not necessary to decide that surrounding circumstances may not be shown to vary or explain the apparent character of the acts, and the intent with which they were done. The facts developed may not be so unequivocal as to be regarded as conclusive. It is sufficient to say that there is no finding of an intent contrary to the creation of a trust, and the facts found do not establish such an adverse intent. But looking at the evidence it is fairly inferable that the intestate designed that the plaintiff and her sister should have the benefit of these deposits, and there are some circumstances from which an inference may be drawn that she regarded the gifts as fixed, and complete. The circumstance that she did not intend that the objects of her bounty should know of her gift until after her death, is not inconsistent with it, and the most that can be said is that she may have believed that the deposits might be withdrawn during her life, and the money converted to her own use. It is not clear that she entertained such a belief, but if she did it would not change the legal effect of her acts.

The judgment must be affirmed.

All concur, except MILLER and EARL, JJ., absent at argument.

Judgment affirmed.

NOTE BY THE REPORTER.—This case is opposed to *Brabrou v. Savings Bank*, 104 Mass. 226; *S. C.*, 6 Am. Rep. 222, and *Clark v. Clark*, 108 Mass. 522; and is denied in *Stone v. Bishop*, U. S. Circuit Court, district of Massachusetts, October 7, 1874; see note, 26 Am. Rep. 684; see, also, *Davis v. Ney*, 125 Mass. 590; *S. C.*, 28 Am. Rep. 272. The following is an abstract of *Gerrish v. New Bedford Inst. for Savings*, Massachusetts Supreme Court, January, 1880: J. D. deposited money in a savings bank, the rules of which forbade more than a \$1,000 deposit to the name of any one person. After depositing \$1,000 to his own name he deposited \$500 to that of J. D., Jr., his son; \$500 to that of S. D., and \$500 to that of E. D., his granddaughters, taking separate books for each deposit. These books he kept possession of, never delivering them to the persons named during his lifetime. He drew and used the dividends on these deposits for himself. The books which he took contained a provision that "any depositor at the time of making a deposit may designate the person for whose benefit the same is made, which shall be binding on his legal representatives." In an action by the executors of J. D., against the savings bank to recover the amount deposited by him, *held*, that evidence that testator had said to each of the three persons in whose name he made the deposits, "that he had put his money in the bank for them; that he wanted to draw the interest during his lifetime; and that after he was gone they were to have the money," was admissible to establish a trust, and if admitted, together with the other facts would warrant a jury in finding a trust to exist. *Uran v. Carter*, 109 Mass. 581. No particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another. It is enough for the latter purpose if it be unequivocally declared in writing, or orally if the property be personal, that it is held in trust for the person named. *Re parte Pys*, 18 Ves. 140. When the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery. The decisions in both the English and American courts in these cases are not entirely

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uniform. The difficulty is in the application of the rule to the varying facts of each case. In *Brabrook v. Boston Five Cents Savings Bank*, 104 Mass. 228, and in *Clark v. Clark*, 108 id. 522, the transaction, so far as it tended to create a trust, was incomplete; the entries in the bank-books did not possess the character of completed and fully executed declarations of trust. See also, *Cummings v. Bramhall*, 120 Mass. 552; *Powers v. Provident Institution for Savings*, 124 id. 378; *Milroy v. Lord*, 4 De G., F. & J. 264; *Warriner v. Rogers*, L. R. 16 Eq. 340; *Richards v. Dilbridge*, L. R. 18 Eq. 11; *Davis v. Ney*, 125 Mass. 590; *S. C.*, 28 Am. Rep. 272; see, also, *Taylor v. Henry*, 48 Md. 550; *S. C.*, 30 Am. Rep. 486.

The following is the syllabus and the material part of the opinion in *Brabrook v. Boston Five Cents Savings Bank*, *supra*: "A. B. deposited in a savings bank a sum in his own name, and a like sum in the name of 'A. B., trustee for C. D.,' who was his daughter, and always retained the pass-books in his own possession. In a suit by the daughter, after his death, against the bank, for the sum deposited by him as trustee for her, parol evidence was offered to show that both deposits were his money, and that one was made in his daughter's name because the amount of both exceeded the sum which the law allowed the bank to hold for a single deposit. *Held*, that the evidence was admissible, notwithstanding that a by-law of the bank, assented to by A. B., provided that any depositor might designate at the time of deposit for whose benefit the same was made, and should be bound by such condition, and that upon the facts, the plaintiff could not recover."

"The plaintiff shows no right to hold the money deposited with the defendant by David Knowles. It was not money that belonged to her originally, as was the case in *Furvelly v. Ladd*, 10 Allen, 127, and *Hynesell v. Lane*, 11 Met. 163, relied upon by the plaintiff's counsel. The money belonged to David Knowles in his own right. He was not, in fact, trustee for Eliza Knowles, otherwise than by the form of the deposit. He was under no previous obligation to pay the money to her, or to hold it for her benefit. The voucher for the deposit, without the production of which, according to the conditions under which it was made, it could not be withdrawn, was never delivered to her, but retained exclusively in his own hands. *Wall v. Provident Institution for Savings*, 3 Allen, 96. The whole transaction was his own voluntary act, to which she was in no way a party or privy. There was no declaration made to her, or to be communicated to her, of any intention that the money should be hers. Even if the form of the deposit is to be taken as conclusive proof of the existence of such an intention in his mind, the execution of that intent was not so far complete as to operate to pass the title. Knowledge of the gift on the part of the donee, at the time it is made, is not essential, it is true, in order that it may take effect. If the act of transfer be complete on the part of the donor, subsequent acceptance by the donee before revocation will be sufficient. But there must be some act of delivery out of the possession of the donor, for the purpose and with the intent that the title shall thereby pass. This principle is distinctly recognized in the case of *Affleck v. Merrill*, 1 Edw. Ch. 332, cited by the plaintiff's counsel. In that case, as well as in several others of those cited, there was a complete delivery of the subject of gift to a third party, in whose hands it was charged with the trust, the donor having parted with the possession and control. In none of them is there a denial of the principle above stated. In *Howard v. Windham County Savings Bank*, 40 Vt. 597, the deposit was made directly to the credit of the intended donee, making it a completed gift. The deposit by Knowles was entered in his own name and to his own credit. There was no direction or authority for the bank to pay it to the plaintiff. The form of the deposit does not imply such an intent, nor any obligation or right, on the part of the bank, so to pay it over. The declaration of trust is evidence that Knowles, the depositor, held the fund in some manner for the benefit of the person named as *cestui qui trust*. But it did not, of itself, transfer to her the possession, nor the right of possession, nor constitute a legal title in her. A deed, executed and put on record by the grantor, does not pass the title without some further act of delivery and acceptance. *Maynard v. Maynard*, 10 Mass. 456; *Samson v. Thornton*, 1 Met. 275. But if the grantor intend that the grantees shall receive it from the register, or if there be a previous agreement that the deed when made shall be so delivered at the registry, it will be effectual as a delivery. *Shaw v. Hayward*, 7 Cush. 170. So if there be an actual trust, and an obligation to make the transfer for the security of that trust, the continued possession of the instrument by the person who executed it, being also its proper custodian for the *cestui qui trust*, is consistent with an assignment completed by delivery, and a legal delivery to pass the title will be inferred from very slight evidence. *Moore v. Hasleton*, 9 Allen, 102. But there

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must be delivery or some equivalent act with intent to pass the title. *Chase v. Breed*, 5 Gray, 449. When the instrument is in fulfillment of a legal obligation, the intent may be inferred from that fact. Perhaps the same would be true of a moral obligation, such as provision for wife or child. *Astren v. Flanagan*, 3 Edw. Ch. 279. We presume the decision in *Wielzel v. Chapin*, 3 Bradf. 286, cited by the plaintiff, was made upon some considerations of this nature. That decision recognizes that it is a question of intent. See, also, *Grangiac v. Arden*, 10 Johns. 222; *Goodrick v. Walker*, 1 Johns. Cas. 251. Assuming in this case that the deposit and declaration of trust was a sufficient act of delivery to pass the title, if such were the intent, we think the facts agreed show clearly that such was not the intent of the depositor. On the contrary it would appear that it was the intention of Knowles to deposit the whole money as his own, and that the form of deposit was adopted for the sole purpose of evading a by-law of the bank and a provision of the statutes limiting the amount that could be received from any one depositor to \$1,000."

The facts in *Clark v. Clark*, 103 Mass. 532, were precisely like those in the last case, and it was decided on the authority of that case, without much consideration in the opinion.

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(75 N. Y. 180.)

Judgment—former adjudication.

A physician sued for services, in a justice's court; the defendant answered, but withdrew his answer, and the plaintiff got judgment without contest. *Held*, a bar to a subsequent action by the defendant against the physician for malpractice in rendering those services.

ACTION for malpractice as a physician and surgeon. The opinion states the facts. The plaintiff had judgment at the trial, which was reversed by the general term.

H. V. Howland, for appellant. Defendant had a right to withdraw his answer in the suit in the justice's court. *Foster v. Milliner*, 50 Barb. 385; *Louno v. Davis*, 13 Johns. R. 226; *Howland v. Luce*, 16 id. 135. The answer having been withdrawn, no issue was tried in the justice's court, and plaintiff was entitled to recover in this action. *Gates v. Preston*, 41 N. Y. 113. The court will only assume that such issues were tried in the justice's court as the party might have tried and had a right to try under the issues formed. *Williams v. Fitzhugh*, 37 N. Y. 444; *Sheldon v. Edwards*, 35 id. 279; *Hayes v. Reese*, 34 Barb. 151. The judgment in the justice's court was not a bar to this action. *Barth v. Burt*, 43 Barb. 628; *Burdick v. Post*, 12 id. 168; *Batterman v. Pierce*, 3 Hill, 171; *Fabricotti v. Launitz*, 3 Sandf. 743; *Smith v. Brown*, 1 Duer, 667; *Signot v. Redding*, 4 E. D. Smith, 285; 14 How. 97. Recovery for

malpractice by plaintiff against defendant would have barred defendant's right to recover for his services. *Edwards v. Stewart* 15 Barb. 67.

Wm. Porter, for respondent.

FOLGER, J. The plaintiff sued the defendant for malpractice as a physician and surgeon. He obtained a verdict for \$1,000. One of the defenses set up by the answer and urged at the trial was this: That the defendant had before that sued the plaintiff in a court of a justice of the peace; that the action there was for services rendered by him to the plaintiff as a physician and surgeon; that he recovered a judgment therefor, which included the value of the same services that constituted the alleged malpractice; that the plaintiff appeared in that court and put in an answer to the complaint, but afterwards withdrew the same and did not contest the defendant's claim.

The question now is whether the judgment so recovered is a bar to the action for malpractice.

It must be considered as settled in this State that a judgment in favor of a physician and surgeon for his professional services, rendered by a court of competent jurisdiction in an action in which the defendant appeared and answered, setting up a defense which he maintained at the trial, or in an action in which he appeared and signed and filed a written confession of judgment for the amount of the services, is a bar to an action for malpractice by that defendant against that physician and surgeon for malpractice in rendering those services. *Bellinger v. Craigue*, 31 Barb. 534; *Gates v. Preston*, 41 N. Y. 113, citing and approving the case in Barb. *supra*.

These decisions cited are put upon the principle of *res adjudicata*, that is, that the same question now raised between the parties has been once judicially decided between them, or their privies in blood, law or estate, and the judgment thereon remains unreversed. The facts actually decided by an issue in any suit cannot be again litigated between the same parties and are evidence between them, and that conclusive, for the purpose of terminating the litigation; and so are the facts alleged by one party and directly admitted by the other. It matters not in what court a judgment, relied upon as a bar, has been rendered so that it had jurisdiction. *Smith v. Hemstreet*, 54 N. Y. 644.

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It seems that these general principles embrace the case in hand; but it is claimed that this case is to be excepted therefrom, and from the force of the decisions above cited, for that there was no issue joined and kept alive in the court of the justice of the peace until the trial there; the defendant in the action there having withdrawn the answer put in by him, and declined to litigate there with the plaintiff. That fact will not avail. It was held, in *Brown v. The Mayor*, 66 N. Y. 385, that an adjudication, made on the default (that is, on the failure to appear at the trial), of the party proceeded against under the statute for the dispossession of a tenant, was conclusive, in an action subsequently pending between the same parties, of the facts alleged, and which were required to be alleged, as the basis of the prior proceedings; and see, also, *Newton v. Hook*, 48 N. Y., 676, and *Jarvis v. Driggs*, 69 id. 143, where 66 N. Y. *supra*, is somewhat limited. This is more especially the case with a judgment of a court of a justice of the peace; for that court cannot render a judgment based alone upon the failure of the defendant to appear. It must have proof of the facts material and necessary to sustain the action. It must proceed to hear the proofs of the plaintiff and determine the same, in the same manner as though issue was joined. 2 R. S. 242, § 92. The omission to appear and plead is not to be taken as an admission of the plaintiff's demand, but he must establish it by testimony, as though an issue had been joined. It is the same if the defendant appear and refuse to plead. *Cudner v. Dixon*, 10 Johns. 106. And this rule is not altered by the Code. *Armstrong v. Smith*, 44 Barb. 120. It follows, then, that whatever must have been proved and established as facts before the justice of the peace, by the defendant in this action and the plaintiff there, in order to obtain the judgment of the court there in his favor, so much is, so long as that judgment stands unreversed, *res adjudicata* between the parties to that and to this action, and conclusive upon them. Now it is a rule, that after verdict it is to be assumed that every fact was proved upon the trial, which was expressly stated in the declaration, or which was necessarily implied from what was so stated; *Spiers v. Parker*, 1 T. R. 141; *Jackson v. Pesked*, 1 M. & S. 234; or which the allegations of the declaration required to be proved. *Nerot v. Wallace*, 3 T. R. 25. The complaint in the action in justice's court alleged a demand for the same services which are set forth in the complaint in the action now before us, as the malpractice sued for, and that those services were worth the sum of

twenty-eight dollars. Those allegations were material, especially that of the value of the services. We must assume, then, that the rendering of the services, and that they were of some value to the plaintiff in this action, was proved. Indeed, the answer of the defendant in this action expressly avers that such proof was made. It is to be taken as true, then, that such proof was made and was passed upon by the justice's court, and that in reaching a judgment for the plaintiff in that action against the defendant there, that court did adjudge and determine that the proof given established the facts of the rendition of the services and that they were valuable to the defendant there. But if of value, they could not have been useless; and if of use, they could not have been harmful; and if not harmful, there could not have been *mala praxis* in the performance of them. Hence, it is *res adjudicata* between these parties that there was not the malpractice, on the allegation of which, in this action, the plaintiff here seeks to recover. The same question now raised in this action between these parties, has once been judicially decided between them, and the judgment remains unreversed. It is said by the appellant here, that if there had been an answer put in and not withdrawn, if a denial of the complaint had been kept alive, and an issue thus raised, he might have shown that the services were not of any value, because they were unskillfully performed. But as we have seen, the justice's court was bound to try the case, as if there had been an issue; and an issue can mean nothing less than a denial of the allegations of the complaint material to show a cause of action. That would put in issue the rendering of the services, and that they were of value, and the extent of the value, if shown to be of any; and would require proof of those facts. *Prindle v. Caruthers*, 15 N. Y. 425-429; *Huntley v. Bulwer*, 6 Bing. [N. C.] 111; *Hill v. Featherstonehaugh*, 7 id. 569. It is said in England, that under a plea of *non assumpsit*, in an action by an attorney-at-law for his professional services, his negligence can be given in evidence, provided it satisfies the jury that the work done became wholly worthless to the defendant by reason of such negligence. *Bracey v. Carter*, 12 Ad. & Ell. 373. In this State it has been once held, that the defense of negligence, in such case, must be specially pleaded, or notice of it given, and that it cannot be given in evidence under the general issue. *Ramsey v. Nichols*, 11 Johns. 547. But it was after that, in *Gleason v. Clark*, 9 Cow. 57, held, in accordance with 12 Ad. & Ell. *supra*, that where the defense goes to destroy the claim entirely, it may be availed of

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under the general issue. Be that as it may under the general rules of pleading, we have seen that by the statute concerning justices' courts, the non-appearance of the defendant to litigate with the plaintiff, is tantamount to a complete denial of his cause of action, and requires of the court that it have full proof thereof, before it gives judgment therefor. Thus proof was needed that the services were of any value at all; and if at all, to what extent. So that non-appearance in effect denied that there was any value, in effect indeed asserted that they were utterly valueless. When the judgment was rendered, and was unreversed and unappealed from, it did establish between the parties to it that there was a value to them, and that the defendant therein had a benefit from them. That question is settled forever between them by that judgment. It cannot be opened and litigated again by either of them, in another action.

The order appealed from should be affirmed, and judgment absolute given for defendant on stipulation, with costs.

All concur, except MILLER and EARL, JJ., absent.

Order affirmed and judgment accordingly.

CREGIN v. BROOKLYN CROSSTOWN RAILROAD CO.

(75 N. Y. 122.)

Abatement — action by husband for injury to wife.

An action by a husband against a carrier of passengers for loss of services of his wife and expenses in consequence of injuries to her person resulting from the defendant's negligence, is grounded in tort, but survives as an action for a wrong to the "property, rights or interests of another," within the statute.*

ACTION of damages. Pending the action the plaintiff died and this motion was to continue the action in the name of his administrator. The opinion states the facts. The motion was granted below.

Winchester Britton, for appellant. This action did not survive. *Carroll v. S. I. R. R. Co.*, 65 Barb. 32; 58 N. Y. 126; *S. C.*, 17 Am. Rep. 221; *Fried v. N. Y. C. R. R. Co.*, 25 How. Pr. 287; 1 Saund.

* Compare *Pries v. Pries*, post, 463.

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216; *Hayden v. Vreeland*, 8 Vroom. 372; *S. C.*, 18 Am. Rep. 723; *Sherington's Case*, Cowp. 576; *Humbly v. Prott*, id. 376; *Haight v. Hayt*, 19 N. Y. 467; 2 Wms. on Exrs. 1470; 1 id. 670; *People v. Gibbs*, 9 Wend. 29; 2 Add. on Torts, 538, note; Freem. 225; Yelv. 89; *Jeanes v. Davis*, 3 Penn. L. J. R. *406; *Green v. H. R. R. Co.*, 2 Abb. Ct. App. Dec. 278; *Wade v. Kulbfleisch*, 58 N. Y. 282, 287; *S. C.*, 17 Am. Rep. 250; *George v. Van Horn*, 9 Barb. 523; *People v. Tioga C. P.*, 19 Wend. 73; *McKee v. Judd*, 2 Kern. 622; *Zabriskie v. Smith*, 13 N. Y. 322; *Hyslop v. Randolph*, 11 How. Pr. 97; *Lamphere v. Hall*, 26 id. 509; *Bk. of Cal. v. Collins*, 5 Hun, 209; *Graves v. Spier*, 58 Barb. 386; *McKee v. Judd*, 2 Kern. 625; *Fried v. N. Y. C. R. R. Co.*, 25 How. Pr. 286.

J. Warren Lawton, for respondent.

RAPALLO, J. We think the appellant is correct in the position that this is an action grounded in tort. The complaint alleges that the defendant received plaintiff's wife in one of its cars as a passenger; that she paid her fare, and while she was such passenger she was thrown down and injured by the negligence of the defendant. No contract with the plaintiff is alleged, and the *gravamen* of the complaint is the wrongful injury to the person of his wife.

The cause of action is therefore one which at common law would have abated by the death of the plaintiff, and the only point to be considered is whether under the provisions of 2 Revised Statutes, 447, sections 1 and 2, it survives.

Section 1 preserves from abatement by death, actions "for wrongs done to the property, rights, or interests of another." This language is very broad and embraces a large class of actions. It is not confined to direct injuries to property, but includes all injuries to the rights or interests of a deceased party, except such as are enumerated and exempted in the following section: No. 2. These are, actions for slander, libel, assault and battery, false imprisonment, and actions on the case for injuries to the person *of the plaintiff*. These exceptions necessarily prevent the surviving of any action for slander, libel, assault and battery or false imprisonment, or for any injury to the person of any deceased plaintiff, however seriously such injury may have affected his property or estate. But they do not cover an action for a wrong done to his rights or interests, even though this wrong may have been effected by means of an injury to the person,

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provided the injury was not to the person of the plaintiff, but of some other party.

The rights and interests, for tortious injuries to which this statute preserves the right of action, have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests, by injuries to which the estate of the deceased is diminished. The exceptions in the statute are such as scarcely to leave any conceivable action for injuries to other rights uncovered by them. But where an injury to pecuniary interests is shown, the intent of the statute seems plain that the cause of action shall survive, notwithstanding that such injury be caused by a tort, provided it be not one of the torts specifically mentioned and excepted in section 2. All pecuniary injuries (not resulting from the enumerated and excepted causes, such as assault and battery, slander, etc.), are placed upon the same footing when occasioned by a tort, as if arising from breach of contract, and such is the language of the statute. It declares that for wrongs done to the rights or interests of another (except the specified wrongs) the cause of action shall survive in the same manner and with the like effect in all respects as actions founded upon contracts. In *Haight v. Hayt*, 19 N. Y. 464, 468, it is said by GROVER, J., that the exceptions contained in the second section manifest the intention of the legislature that all other actions founded upon torts should survive. And in the same case at page 474, DENIO, J., says that the action (which was for false representations), was for a "wrong done" to "the rights and interests" of the plaintiffs, and the exception in section 2 shows, if there was otherwise any doubt, that the prior section was intended to embrace this case.

The wrong done in the present case is alleged in the complaint to have been a wrongful injury to the person of the plaintiff's wife, whereby she was rendered permanently unable to attend to her household and other duties, and the plaintiff was obliged to expend sums of money in procuring medicines and necessaries and employing physicians to treat her for her injuries, and that he had been and would be permanently deprived of her services and comforts.

This, we think, was a wrong done to the rights and interests of the husband. He had a right to the services of his wife, they were of pecuniary value to him, and any wrong, by which he was deprived of those services, or put to expense to remedy or palliate the consequences of the injury to his wife, was a wrong done to his rights and interests. Adopting the construction that pecuniary rights and inter-

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ests only are protected by the statute, these were plainly involved, and if the pleader had left out the word "comforts," the complaint would have disclosed an injury to pecuniary interests exclusively. We do not think that because in addition to the injury to these interests, the personal comfort of the plaintiff was interfered with, that circumstance should deprive his representatives of their remedy for the pecuniary injuries which he sustained, and which diminished his estate, nor do we think that it can be laid down as a rule of universal application to all classes of society, that in such a case the injury to the personal feelings and comfort of the husband is the *gravamen* of the wrong, and the pecuniary injury a mere incident, of which the law will not take notice independently of the former.

Where an injury is done to the person of the plaintiff the pecuniary damage sustained thereby cannot be so separated as to constitute an independent cause of action, for the cause of action is single, and consists of the injury to the person; the damages are the consequence merely of that injury, and where by the terms of the statute such a cause of action abates, the character of the damages cannot save it. But where the cause of action is not one of those enumerated in the statute, the character of the damages may control the question whether there is an injury to the property, rights, or interests of the plaintiff.

The case of *Wade v. Kalbfleisch*, 58 N. Y. 282; S. C. 17 Am. Rep. 250, does not conflict with these views. The question of law involved in that case was whether the action was on contract, or for a personal injury. The majority of the court held that it was an action for a personal injury, and that although pecuniary interests might be incidentally involved, the injury to them did not constitute the cause of action. This clearly appears from the prevailing opinion of CHURCH, Ch. J., who says, at page 287, that the action (breach of promise of marriage) was *sui generis*; that the form of action was not material; that the controlling consideration was that it did not relate to property interests, but to personal injuries. Granting that it was not an action on contract, but was one for personal injuries, the conclusion necessarily followed. The injuries were to the person of the plaintiff, and the case was within the very letter of the exception contained in section 2 of the statute. Even though it was a tort affecting the rights and interests of the plaintiff, if it was an injury to her person it could not survive. The present action was for a tort which affected injuriously the rights and pecuniary interests of the plaintiff. It was

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therefore for a wrong done to those rights and interests, and is covered by section 1 of the statute. The cause of action was not an injury to his person nor any of the others enumerated in section 2, and is not within the exception. It must therefore be held to survive with like effect as if the action were on contract.

The order should be affirmed, with costs.

All concur, except MILLER and EARL, JJ., absent at argument.

Order affirmed.

PRICE v. PRICE.

(35 N. Y. 244.)

Abatement—action by woman for fraudulently inducing her to marry.

An action of damages for fraud of the defendant in inducing the plaintiff to marry and cohabit with him, by means of false and fraudulent representations that his first wife was dead, is for injury to the person, and does not survive.*

MOTION for revivor of action. The opinion states the case. The motion was denied below.

John L. Hill, for appellant. The relation of the parties prior to the decree against plaintiff was that of husband and wife under a valid marriage. 2 R. S. *139, §§ 5, 6, art. 1, title 1, ch. 8; 5 N. Y. Stat. at Large, 400, note; *Williamson v. Parisien*, 1 Johns. Ch. 392; *Valleau v. Valleau*, 6 Pai. 209; *Brower v. Bower*, 9 Leg. Obs. 196; *Cropey v. McKinney*, 30 Barb. 55; *Griffin v. Banks* (N. Y. G. T.), 24 How. Pr. 214; *White v. Lowe*, 1 Redf. 376; *Wyles v. Gibbs*, id. 382; 2 Scribner on Dower, 1-3; 1 Bishop on Mar. and Div.; *Rex v. Jacobs*, 1 Moody, 140. The decree annulling this marriage was not retroactive. *Griffin v. Banks*, 37 N. Y. 621; 1 Bishop on Mar. and Div., § 118; 2 id., § 690. This marriage gave plaintiff a valid and subsisting interest, if not an estate, in the defendant's property. *Griffin v. Banks*, 37 N. Y. 621; 1 Bishop on Mar. and Div., § 116; 4 Kent. Com. 36; *Mills v. Van Voorhies*, 20 N. Y. 412; *Simar v. Canaday*, 53 id. 304; 13 Am. Rep. 523; *Douglas v. Douglas*, 11 Hun, 406; *Seoaine v. Perine*, 5 Johns. Ch. 482; *Perine v. Dun*, 3 id. 515; *Linker v. Smith*, 4 Wash. C. C. 224; *Smith v. Smith*, 6 N. J. Eq. 515; *Petty*

* Compare *Oregin v. Brooklyn Cross-town Railroad Co.*, ante, p. 459.

v. Petty, 4 B. Munroe, 215; *Young v. Young*, 1 Cow. 131. A warranty of marriageable capacity, where the agreement results in marriage, is an agreement in contemplation of marriage, and continues after the marriage. Laws 1849, ch. 375, § 3; 4 N. Y. Stat. at Large, 514. This action was not *ex delicto*. *Austin v. Rawdon*, 44 N. Y. 63, 70; *Conaughty v. Nichols*, 42 id. 83; *Graves v. Wait*, 59 id. 156; *Freer v. Denton*, 61 id. 492; *Vilmar v. Schall*, id. 564. The law will imply a promise in this case to make reparation for the injury. 2 Bishop on Mar. and Div., § 690; 2 Story's Eq. Jur., § 1255; *Norton v. Coons*, 3 Den. 130, 134; *Poor v. Guilford*, 10 N. Y. 273, 276; *Sheldon v. Sherman*, 42 id. 484; *Byxbie v. Wood*, 24 id. 610. Upon legal principles and analogies the gist of the action is an injury to property. *Cregin v. Croestown R. R. Co.* 75 N. Y. 192; *Fried v. N. Y. C. R. R.*, 25 How. Pr. 286, 287; *Zabrickie v. Smith*, 13 N. Y. 322; *Haight v. Hayt*, 19 id. 474.

Charles Hughes, for respondents.

EARL, J. The defendant named in the complaint died after the action was at issue, and a motion was then made to substitute his executors in his stead, and to continue the action against them. The executors have thus far successfully resisted the motion on the ground that the cause of action alleged in the complaint did not survive against them, and whether it did so survive is the sole question for our determination.

It is alleged in the complaint that the defendant was in 1839 married in England, to Susannah Butler, and that after living with her for a short time, they separated, and he came to the United States; that in 1843, he was again married, in this State, to Caroline Juliet Barton, and lived with her until 1860, when they separated; that in 1863, he commenced an action against her to have his marriage with her declared null and void, on the ground that his first wife was living at the time of such marriage, and was still living, and he obtained a judgment, annulling such marriage; that by his procurement a clause was inserted in such judgment, whereby he intended to cause the plaintiff to believe that he was by that judgment, or as one of its results, made competent to marry again; that before the entry of such judgment, the plaintiff knew the defendant, and entertained for him great personal confidence and esteem, and he had informed her that he had been married in England, and that his first

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wife went to Australia not long after he came to this country, and died there, and that she believed him; that after the entry of such judgment, the defendant stated to her that he had finally discovered that the said Caroline was a bad woman, and that on that ground he had obtained the judgment of divorce from her, and "represented, promised, undertook, covenanted and warranted that he had the right and was in all respects competent to marry again, thereby intending to have her believe that such marriage, if consummated with defendant, would be valid to all intents and purposes," and thereupon solicited the plaintiff to marry him, and in confirmation of his representations exhibited to her a paper purporting to be the judgment aforesaid containing the clause aforesaid, and that the plaintiff relying upon all this agreed to marry him, and did subsequently marry him and live with him until 1871, bearing him three children. The complaint then alleges that the said "statements, representations, promise, undertaking, covenant and warranty were not true for the reason that the said Susannah Butler then was, and now is, alive," and that the defendant was incompetent to enter into a valid marriage with her; that afterwards the defendant taking advantage of the wrong he had thus done her, abandoned her, and commenced an action against her to annul his marriage with her on the ground that the said Susannah Butler was living at the time of such marriage, and was still living, and obtained judgment annulling such marriage, and that the said acts of the defendant "were done with intent to cheat and defraud her." She also alleged that the defendant was worth upwards of \$1,000,000, a large portion of which was in real estate, and she prayed judgment for \$100,000.

The right to maintain this action cannot be based upon anything that transpired after the marriage. It is not alleged that he prosecuted the action to annul the marriage fraudulently; and the facts that he did prosecute the action and refused longer to live with the plaintiff could not, of themselves, give her a right of action. If the action could otherwise be maintained, then his conduct and the facts that transpired after the marriage might be proper elements in estimating the amount of damage to be awarded her.

This action may be revived against the executors if the cause of action survives, and to ascertain whether it does survive we can look only to our statutes. It is provided in the Revised Statutes (2 R. S. 113) that "actions of account and all other actions upon contract may be maintained by and against executors in all cases in which

the same might have been maintained by or against the respective testators." It was decided in *Wade v. Kalbfleisch*, 58 N. Y. 282; S. C., 17 Am. Rep. 250, that a contract of marriage was not a contract within the purview of this statute, and that an action for breach of promise of marriage did not survive. So far as the complaint in this action can be claimed to allege a contract it is a contract of marriage. It is true that it alleges that the defendant "promised, undertook, covenanted and warranted that he had the right and was in all respects competent to marry." These allegations do not alter the character of the action. What is thus alleged is implied in every promise of marriage, to wit, that the promisor has the right and is competent to marry. The promise could not be kept by one not competent to marry, and a mere form of marriage, void or voidable at the election of the promisor, would not satisfy the promise. Hence, if this be regarded as an action upon the contract of marriage it must be controlled by the case above cited, and it is not removed from the control of that case because a form of marriage followed by cohabitation was celebrated.

But the better construction of this complaint is that it is an action purely for a wrong in inveigling the plaintiff by false representations and deceit into a void or voidable marriage followed by several years of cohabitation. A great wrong was doubtless thus done the plaintiff, for which, if the defendant had not died, she might have recovered. But there is no statute by virtue of which an action for such a wrong survives. It is provided by sections 1 and 2 in 2 Revised Statutes, 448, as follows:

"§ 1. For wrongs done to the property, rights or interests of another for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death by his executors or administrators against such wrong-doer, and after his death against his executors or administrators in the same manner and with the like effect in all respects as actions founded upon contracts.

"§ 2. But the preceding section shall not extend to actions for slander, for libel, or to actions of assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or the person of the testator or intestate of any executor or administrator."

It has been decided that wrongs mentioned in the first section are such only as injure property or estate. *Wade v. Kalbfleisch, supra*;

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Regin v. Brooklyn and Crosstown R. R. Co., ante, p. 192. The wrongs alleged here are merely personal wrongs, inflicting injury to the person of the plaintiff, which at common law would have been redressed by an action on the case. They did not affect her property or estate. It does not appear that she ever had any estate. It is true that if the marriage had not been annulled she might have had property interests in the estate of the defendant as his widow. But he had the legal right to institute the action, and obtain the judgment annulling the marriage. That judgment was the act of the law, and he did no legal wrong to the plaintiff in procuring it.

In any aspect, therefore, the cause of action did not survive, and the order of the general term must be affirmed.

All concur.

Order affirmed.

CLAFIN V. MEYER.

(75 N. Y. 302.)

Negligence—warehouseman—burden of proof—burglary.

In an action against a warehouseman for goods lost, it appearing that they were stolen by a burglar, the burden is still on the plaintiff to show that the negligence of the defendant contributed or led to the loss.

ACTION against a warehouseman for neglect to deliver goods. The opinion states the case. The plaintiff had judgment below.

A. R. Dyett, for appellant.

Wm. Henry Arnoux, for respondents. Negligence is a question of fact. *Fairfax v. N. Y. C., etc., R. R.*, 67 N. Y. 11, 14; *Maher v. R. R.*, 67 id. 54; *Matter of Beggs*, 67 id. 123. The plaintiff having proved the loss of the goods, the burden of proof was upon the defendant to establish affirmatively that the loss was not caused by any want of proper care or diligence on his part. *Coleman v. Livingston*, 4 J. & S. 37; *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 184-189; *S. C.*, 6 Am. Rep. 61; *Platt v. Hibbard*, 7 Cow. 500; *Schuerin v. McKie*, 51 N. Y. 180-186; *S. C.*, 10 Am. Rep. 581; *Fairfax v. N. Y. C. and H. R. R. R.*, 67 id. 11, 14; *Steers v. Liverpool, N. Y. and P. Steamship Co.*, 67 id. 1, 6; *S. C.*, 15 Am. Rep.

453; *Faucett v. Nichols*, 64 id. 377, 381; *Tompkins v. Haile*, 3 Wend. 406; *Foshay v. Ferguson*, 5 Hill, 154; Sir Wm. Jones' Essay on Bailments, 44, 79.

HAND, J. The counsel for the respondents is correct in his position that the question of burden of proof is the material one upon this appeal. For the evidence is such that if it were incumbent upon the defendant to prove himself free from all negligence causing or attending upon the burglary, and not merely to leave the case as consistent with due care as with the want of it, it is clear that the judgment, so far as it adjudges his liability for the goods, must be affirmed, as we cannot say that such proof of a conclusive character was given. But the law as to the burden of proof is pretty well settled to the contrary. Upon its appearing that the goods were lost by a burglary committed upon the defendant's warehouse, it was for the plaintiffs to establish affirmatively that such burglary was occasioned or was not prevented by reason of some negligence or omission of due care on the part of the warehouseman.

The cases agree that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them or account for such non-delivery, or, to use the language of SUTHERLAND, J., in *Schmidt v. Blood*, where "there is a total default in delivering or accounting for the goods," 9 Wend. 268, this is to be treated as *prima facie* evidence of negligence. *Fairfax v. N. Y. C. and H. R. R. Co.*, 67 N. Y. 11; *Steers v. Liverpool Steamship Co.* 67 id. 1; S. C., 15 Am. Rep. 453; *Burnell v. N. Y. C. R. R. Co.*, 45 N. Y. 184; S. C., 6 Am. Rep. 61. This rule proceeds either from the assumed necessity of the case, it being presumed that the bailee has exclusive knowledge of the facts and that he is able to give the reason for his non-delivery, if any exist, other than his own act or fault, or from a presumption that he actually retains the goods and by his refusal converts them.

But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no *prima facie* evidence of his want of care, and the court will not assume in the absence of proof on the point that such fire or theft was the result of his negligence. *Lamb v. Camden and Amboy R. Co.*, 46 N. Y. 271, and cases there cited; S. C., 7 Am. Rep. 327; *Schmidt v. Blood*, 9 Wend. 268; *Platt v. Hibbard*, 7 Cow. 500,

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note. GROVER, J., in 46 N. Y., *supra*, says, in delivering the opinion of the court, the question is "whether the defendant was bound to go further (i. e., than showing the loss by fire) and show that it and its employees were free from negligence in the origin and progress of the fire, or whether it was incumbent upon the plaintiffs to maintain the action to prove that the fire causing the loss resulted from such negligence." And he proceeds to show that the charge of the judge who tried the cause gave to the jury the former instruction, and that this was contrary to the law and erroneous. So SUTHERLAND, J., in 9 Wend, *supra*, in the case of a warehouseman, says: the *onus* of showing the negligence "seems to be upon the plaintiff unless there is a total default in delivery or accounting for the goods." And he cites a note of Judge COWEN to his report of *Platt v. Hibbard*, 7 Cow. 500, in which that very learned author says, criticising and questioning a charge of the circuit judge, "the distinction would seem to be that when there is a total default to deliver the goods bailed on demand, the *onus* of accounting for the default lies with the bailee; otherwise he shall be deemed to have converted the goods to his own use and trover will lie (*Anonymous*, 2 Salk. 655), but when he has shown a loss or where the goods are injured, the law will not intend negligence. The *onus* is then shifted upon the plaintiff."

It will be seen, as the result of these authorities, that the burden is ordinarily upon the plaintiff alleging negligence to prove it against a warehouseman who accounts for his failure to deliver by showing a destruction or loss from fire or theft. It is not of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these cases any real "*shifting*" of the burden of proof. The warehouseman in the absence of bad faith is only liable for negligence. The plaintiff must in *all cases*, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him. If he proves the demand upon the warehouseman and his refusal to deliver, these facts unexplained are treated by the courts as *prima facie* evidence of negligence; but if, either in the course of his proof or that of the defendant, it appears that the goods have been lost by theft, the evidence must show that the loss arose from the negligence of the warehouseman.

Applying these principles to the present case, we must hold that when it appeared, as it did, that the goods were taken from the defendant's warehouse by a burglarious entry thereof, the plaintiffs should have shown that some negligence or want of care, such as a prudent man would take under similar circumstances of his own property, caused or permitted or contributed to cause or permit that burglary.

[Omitting questions of fact.]

The judgment must be reversed and new trial ordered, with costs to abide the event.

All concur, except MILLER and EARL, JJ., absent at argument.

Judgment reversed.

MILES v. LOOMIS.

(75 N. Y. 288.)

Evidence — handwriting — expert opinions.

On a question of handwriting, the opinions of experts, founded solely on a comparison of the writing in dispute with genuine signatures properly in evidence, are competent evidence.

ACTION on a promissory note. The opinion states the point. The defendant had judgment below.

Frank Hiscock, for appellant. It was error to allow witnesses with no other qualifications than they testified they had as experts, to give opinions that the signature to the note sued on was simulated. *People v. Spooner*, 1 Den. 343; *Johnson v. Hicks*, 1 Lans. 150; *Koeing v. Manly*, 49 N. Y. 192-203; *S. C.*, 10 Am. Rep. 346; *Matthews v. Coe*, 49 id. 57; *Sheldon v. Sheldon*, 51 id. 354.

Wm. C. Ruger, for respondent.

HAND, J. I think the two documents put in by the defendants without objection on the part of the plaintiff must be regarded as properly in evidence for all the purposes of the case. It need not be held, where it clearly appears either by the avowal of the party offering them or otherwise, that instruments are put in solely for the pur

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pose of being submitted to the jury or referee for comparison with a disputed signature or subjected to the examination of expert witnesses for such comparison, that the failure to object when they are offered absolutely precludes the party from subsequently resisting their use for that purpose. Here the note of the plaintiff and the will of the testator were regarded by the defendants and offered, for aught that appears, as proper pieces of evidence in the cause for other purposes than comparison. They may have been mistaken in this, but we have not the evidence given on the trial before us and cannot certainly so decide; and if they were mistaken, the plaintiff should have raised the objection to their admission when offered. He cannot say that he did not object to them when offered although knowing them to be irrelevant or inadmissible, because he supposed they could do him no harm, but now upon finding them, when in as evidence, capable of injury, asks the appellate court to review the propriety of their admission, although not objected to, and reverse the judgment, if they conclude that an objection to such admission, if taken, would have been well founded. The note seems to us to have been competent evidence in the cause and the will hardly so, but these are questions which the appellant has no right upon this record to call upon us to decide.

Treating therefore these two signatures of the testator as properly in evidence, the question is whether experts in handwriting could be permitted, upon comparison in court of these signatures with that of the note in suit, without any other knowledge of the testator's writing, to express an opinion as to the genuineness of the latter and as to whether it appeared a natural or simulated hand.

The statement of the learned counsel for the appellant that precisely this kind of evidence has never yet been held proper by the court of last resort in this State is, we believe, accurate, although it comes in *principle* within the decision in *Dubois v. Baker*, 30 N. Y. 355, 361. Indeed, I think it must be conceded that the earlier cases adjudged in our courts lean pretty decidedly against the admissibility of such evidence. In this respect we were formerly more strict than any of the other States. *People v. Spooner*, 1 Den. 343; *Jackson v. Phillips*, 9 Cow. 112; *Phoenix F. Ins. Co. v. Philip*, 13 Wend. 81. Our courts followed, of course, the common law which was supposed to differ from the practice of the civil and ecclesiastical courts. The *nisi prius* decisions in the English courts, although not in entire harmony (*Allesbrook v. Roach*, 1 Esp. 351), and much

criticised by the text-writers, were generally hostile to the admission of comparison by experts until by the act of parliament in 1854 such evidence was declared legitimate. *Stranger v. Searle*, 1 Esp. 14; *Clermont v. Tullidge*, 4 C. & P. 1; *Rex v. Cator*, 4 Esp. 117. Even, however, before the passage of that act a jury was allowed itself to institute the comparison, but only with documents in evidence before them and relevant to the issue. *Doe dem. Perry v. Newton*, 5 Ad. & Ell. 514; *Solita v. Yarrow*, 1 M. & R. 133; *Griffith v. Williams*, 1 Cro. & Jer. 47; *Bromage v. Rice*, 7 C. & P. 548.

In *Doe v. Suckermore*, decided in 1836, the whole subject received very great consideration, four judges of the King's Bench delivering elaborate opinions, reviewing the cases very fully, and discussing very thoroughly the principles upon which evidence of this character should be received or excluded. The rule seemed to be conceded in that case by all the judges, that as to any but ancient writings, an opinion formed upon a mere comparison of hands at the trial, *eo instanti*, was not admissible, but they were equally divided upon the question whether a knowledge of the handwriting might be obtained by a skilled person, sufficient to render him a witness competent to speak as to the genuineness of the signature, merely by a previous examination of other signatures proved to be genuine. Lord DENMAN, Ch. J., *Doe dem. Mudd v. Suckermore*, 5 Ad. & Ell. 737; WILLIAMS, J., *id.* 718. This distinction is admitted to be subtle, but seems to have prevented the concurrence of these two judges with COLERIDGE and PATTERSON, JJ., in refusing the rule for a new trial. It is to be observed that the decisions to which I have referred were as to evidence of experts that a signature was or was not that of the party whose it purported to be. Upon the question whether a signature, upon its bare inspection alone, appeared to be simulated and not natural, persons professing the skill to speak have been more often admitted, although this species of evidence has been declared not entitled to any credit. Lord DENMAN, 5 Ad. & Ell. *supra*.

In our State, the legislature has not interfered, as in England, but the courts have in their later decisions shown a disposition to relax the rule. It has been conceded here, that while documents could not be put in evidence for the purpose of comparison, yet, as in the English courts, those which were in for other purposes might be compared with the disputed signature by the jury. *Van Wyck v. McIntosh*, 4 Kern. 439; *Randolph v. Loughlin*, 48 N. Y. 456. And in *Dubois v. Baker*, 30 N. Y. 355, 361, the majority of the judges

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held evidence admissible which cannot in principle be distinguished from that admitted in the present case. DAVIES, J., indeed, in delivering the opinion, expressly says: "A comparison of the handwriting of papers introduced and relevant, is permitted to ascertain the genuineness of the one in controversy." And MULLIN, J., though dissenting on other grounds, concurred in this. 30 N. Y. 866.

Although this decision lays down, as has been already intimated, a somewhat more liberal rule as to evidence of handwriting than had previously prevailed in this State, yet it has been generally acquiesced in, is in conformity with the law in other States, and seems to have become an established practice in the trial courts. See *Goodyear v. Vosburgh*, 63 Barb. 154; *Johnson v. Hicks*, 1 Lans. 160; *Roe v. Roe*, 40 Superior Court (8 J. & S.) 1.

We are very strongly of the opinion that it is sounder in principle than the more narrow one, and in no respect an infringement upon any wholesome and just limitation of expert testimony.

Evidence of handwriting, it is universally conceded, may be opinion merely. It is as universally conceded that a witness who has either ever seen the party write, or who, not having seen him write, has received letters from him which have been "acted upon" by him as genuine, is competent to give an opinion as to his handwriting. And this competency is not affected by the lack of frequency of observation, the length of time which has elapsed since the writing was seen, or the slightness of the correspondence, although the weight of the opinion will of course depend much upon these circumstances.

From what, in these cases, is the opinion derived if not from a mental comparison of hands? The signature is presented to the witness and his only means of forming an opinion upon it is by recalling with more or less distinctness to his mind images of the signatures he has either seen made, or attached to letters received, and comparing them with the one presented for his opinion. This is certainly a "comparison of hands," and in my judgment, no favorable distinction as to accuracy or safety can be made between such a mental process and that of the expert who has become quick by practice in detecting identity of hands, and also compares in his mind and with his eye the one in question with other signatures as certainly genuine as those which the ordinary witness has seen written or received in letters. The comparative weight of the two kinds of evidence is not the question under consideration. The opinion of

the ordinary witness, founded only upon a mental comparison of the disputed writing with a single signature seen by him twenty years before, would be worth little, but it would undoubtedly be competent. *Jackson ex dem. v. Van Dusen*, 5 Johns. 144; *Eagleton v. Kingston*, 8 Ves. 473. So the opinion of an expert founded upon a comparison with but one or two genuine signatures should not, perhaps, be regarded as of much value, but it still has every claim, in principle, to competency possessed by the other. Nor does the distinction sought to be raised by Lord DENMAN in *Doe v. Suckermore*, *supra*, between an opinion of an expert who has previously examined other genuine signatures put in evidence, and then is called to speak as to genuineness from his knowledge of the signature thus gained without actual comparison before the court, and one given upon an examination or comparison in court of the signatures and without any previous knowledge, seem, on scrutiny, to be well grounded or practicable. It would be impossible to draw a line between these processes. It is undoubtedly true that the opinion as to handwriting should depend not so much upon mathematical measurements and minute criticisms of lines, nor their exact correspondence in detail when placed in juxtaposition with other specimens, as upon its general character and features, as in the recognition of the human face. But in the case of one expert, his mental image or idea of the genuine handwriting may become as clear and vivid and accurate by an examination of the other signatures, on the instant, as in the case of another of less practice or quickness of perception, after hours or days of study. The amount of knowledge gained by this study, and the length of time and frequency of opportunity to gain it, affect the weight of the evidence, as in the case of the ordinary witness, but cannot properly decide its competency.

The principal objections which have been raised to the comparison of hands are two: First. The introduction of numerous and distracting collateral issues as to the genuineness of the signatures to be compared. As to each one of these it is said there might be the same controversy as with regard to the original signature and the further introduction of the comparison of hands, and so the number of issues to be decided be without end. But this objection seems tolerably met by the restriction of the signatures to be compared to those necessarily or properly proved in the case as relevant evidence for other purposes, and upon the genuineness of which, if there is any controversy about them, the jury must pass in any

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event. This limitation, it must be conceded, is not very philosophical or logically satisfactory, but is justified by the necessity of the case, and at all events answers the objection of collateral issues. Second. The second objection to the comparison of hands is that no man writes always the same signature and the specimens will be unfairly selected as being unlike or like the signature in dispute, according to the interest of the party producing them. They will not be fair average specimens of the general character of the handwriting. DALLAS, Ch. J., *Burr v. Harper*, Holt N. P. C. 44. That consequently, the expert, to whom they are submitted, will have no opportunity of obtaining an accurate notion of the ordinary natural hand; and as illustrative of this objection, the decision of Lord KENYON is cited, who refused to allow a witness to give an opinion, whose only knowledge was from the signatures he had seen the party himself write for the avowed purpose of showing his true manner of writing. *Stranger v. Searle*, 1 Esp. 14. The force of this objection also is, I think, done away by the restriction of the rule to signatures relevant in the cause for other purposes, and as to which therefore there could hardly be any selection of the signatures for the purposes of comparison.

On the whole therefore I am inclined to concur in the soundness of the doctrine upon this point contended for in the most approved text-writers upon evidence. "It cannot be denied" says Mr. Starkie (*Starkie on Evi.*, vol. 2, p. 375) "that abstractly a witness is more likely to form a correct judgment as to the identity of handwriting by comparing it critically and minutely with a fair and genuine specimen of the party's handwriting than he would be able to make by comparing what he sees with the faint impression made by having seen the party write but once, and then perhaps under circumstances which did not awaken his attention." "When other writings" says Prof. Greenleaf (*Greenl. on Evi.*, § 578) "admitted to be genuine are already in the case, here comparison may be made by the jury with or without the aid of experts." See, also, Phillips on Evi., vol. 1 (6th ed.), 472; Evans' note to Pothier on Contracts, 2 Evans' Pothier, 185.

My conclusion is that there was no error in the admission of the evidence of experts before the referee.

The counsel for appellant insists here that the witnesses called by the defendants as experts were not qualified as such, but no such objection was taken upon the trial. These witnesses were, however,

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we think, shown to be sufficiently competent to give the opinions upon handwriting. They had been engaged in occupations in which it was their duty to scrutinize handwritings and detect forgeries and had acquired more or less skill by practice.

There being no error committed upon the trial, the judgment must be affirmed, with costs.

All concur, except ANDREWS, J., absent.

Judgment affirmed

BELKNAP V. BENDER.

(75 N. Y. 446.)

Statute of frauds — promise to pay the debts of another.

Defendant, a creditor of W. & M., who were engaged in running a saw-mill, agreed to take the mill, manufacture the logs into lumber, market them, and apply the net proceeds to his own demand, and to other debts, among which was one due the plaintiff for work. The defendant explained the arrangement to the plaintiff, employing him upon wages in his own service, and reiterating the promise to pay the debt of W. & M. The defendant having disposed of about one-half the lumber, the plaintiff sued upon the promise to pay that debt. *Held*, that the promise was within the statute of frauds.

ACTION on contract. The opinion states the case. The plaintiff had judgment below, which was reversed at general term.

A. Coburn, for appellant. The promise proved and found by the jury is not within the statute of frauds. 2 N. Y. Stat. at Large, 140, § 2, sub. 2; *Leonard v. Vredenburg*, 8 Johns. 29; *Farley v. Cleveland*, 4 Cow. 432; *Throop on Verb. Contrs.* 528; also §§ 64, 81, 533, 540; *Mallory v. Gillette*, 21 N. Y. 412; *Brown v. Weber*, 38 id. 187, 189, 190; *Sanders v. Gillespie*, 59 id. 250, 251, 252; *Booth v. Eighmie*, 60 id. 238, 240; *S. C.*, 19 Am. Rep. 171; *Tallman v. Bressler*, 65 Barb. 369, 378, 379; *Fullam v. Adams*, 37 Vt. 391; *Mauls v. Bucknell*, 50 Penn. St. 39; *Robinson v. Gillman*, 43 N. H. 485; *Fell on Guaranty*, 1, 12, 13 and note (1); *Lawrence v. Fox*, 20 N. Y. 268. The express promise to pay \$1,000 at once was in law a waiver, both as to the time of payment and the extent of defendant's liability. *Williams v. Potter*, 2 Barb. 316; *Buel v. Trustees, etc.*, 3 Comst. 197; *Root v. Wagner*, 30 N. Y. 9; *Miller v. Hackley*, 5 Johns. 375; *Botts*

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v. *Perine*, 14 Wend. 219; *Boehen v. Ins. Co.*, 35 N. Y. 131; *Throop on Verb. Contr.* §§ 567, 568, 569, 570.

C. D. Adams, for respondent.

EARL, J. In 1872, the plaintiff was engaged with his men and teams in managing a saw-mill for the firm of Ward & McVicker, and they were indebted to him, for labor performed, in the sum of \$1,500, and were also largely indebted to the defendant and other parties. The defendant then for the purpose of securing his debt entered into the following agreement with the firm:

"Agreement made 20th August, 1872.

"W. M. Bender hereby agrees with Ward & McVicker to take their mill, called Shed's mill, to run the said mill, and to saw up their logs now lying in their log yard, to ship the lumber and to sell the same, and to apply the proceeds thereof to the payment of the current expenses of sawing and shipping said lumber, and also to the payment of the judgment claims, amounting to \$4,872.29, and the claim of said Bender, say \$7,000, and the rent of mill, \$1,000, now due, and the back wages of their hands, say \$1,500, as stated in schedule annexed, and the balance, if any, to pay over to said Ward & McVicker, for the consideration of ten per cent on the amount of said sales; and the said Bender agrees, in case of any sale of said logs or lease of said mill, under any judgment, to buy the same and to hold them in order to carry out the true intent of this agreement, it being understood that said Bender is only to pay said several claims as mentioned above from the proceeds of said lumber as aforesaid.

"BENDER, SON & CO.

"WARD & McVICKER."

To this agreement was annexed a schedule of the debts to be paid under the agreement among which was the debt due the plaintiff.

In pursuance of this agreement the defendant took possession of the mill, and the stock of logs and lumber on hand, and at the time of the commencement of this action had disposed of about half of the lumber.

This action is brought by plaintiff, not for an accounting under the agreement and to recover his share of the proceeds of the lumber, but to recover the whole sum due him from Ward & McVicker, upon the theory that defendant had absolutely promised to pay it to him.

Upon the trial the plaintiff testified that the defendant came to him and told him to keep on working at the mill, and he would pay him for his work at the same rate which Ward & McVicker had been paying him, and that he had bought the stock of Ward & McVicker, and had made an arrangement with them to pay him what was due him from them, and if he would keep on working for him he would pay him for his work, and in a day or two would pay him \$1,000 upon the amount due him from Ward & McVicker; and he testified that he went on and worked for the defendant, but that the defendant had failed to pay him the amount due him from Ward & McVicker. The plaintiff recovered \$1,000 and interest.

The promise of the plaintiff to work for the defendant at what appeared to be a full compensation did not furnish a consideration for defendant's promise to pay Ward & McVicker's debt. *Pfeiffer v. Adler*, 37 N. Y. 164. And the trial judge so held. But from plaintiff's evidence standing alone, it might have been inferred that defendant had purchased the saw-mill stock of Ward & McVicker, and had agreed with them to pay a portion of the purchase-price to him in satisfaction of the debt due him from them, and in that case under the rule laid down in *Lawrence v. Fox*, 20 N. Y. 268, and other similar cases, the plaintiff could have recovered. But at a later stage of the case, the written agreement between defendant and Ward & McVicker was proved, and that shows precisely what defendant agreed with them to do. Under that agreement, he did not become personally liable to pay the plaintiff; he did not agree to pay plaintiff absolutely, or with his own funds. He did not purchase the stock. He simply agreed to saw the logs, and market the lumber, and apply the net proceeds in payment of the debts specified. He incurred no personal liability for the debts, and was required only to be faithful in the discharge of the trust assumed.

The defendant could not become bound to pay to the plaintiff the debt due him from Ward & McVicker by any verbal promise made to him. Such a promise to be binding within the statute of frauds must be in writing, and founded upon a sufficient consideration passing between the parties. But if Bender had purchased lumber of Ward & McVicker, and thus became indebted to them, and in consideration thereof had agreed to pay a portion of his debt to the plaintiff in satisfaction of the amount due him from Ward & McVicker, such a promise, as stated above, would not have been within the statute of frauds. But the difficulty here is that there

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was no such debt to Ward & McVicker, and no such promise by the defendant. But the trial judge held that if the jury were satisfied that the defendant agreed to pay the \$1,000, as testified to by plaintiff, the plaintiff could recover upon the theory that the property had been placed in the hands of the defendant for sale, and that he would be liable to pay the plaintiff after he had disposed of it, and hence, that he could waive the delay and be bound by his promise to pay before he had realized the proceeds. And it is upon this theory in part that the plaintiff now seeks to uphold the recovery at the circuit.

The case then stands thus: The defendant by his agreement with Ward & McVicker was not personally bound to pay this debt. He was bound only to pay it out of the proceeds of the property when realized. The property was placed in his hands upon the consideration expressed in the paper, and he had it at the time of the alleged promise to the plaintiff. What consideration is there to uphold the promise? Clearly none. That promise, if valid, imposed upon him an entirely new obligation; it bound him to pay the \$1,000 personally, whether he realized sufficient to pay it from the sale of the lumber or not. It created a personal liability when none existed before. Such a promise to be valid, aside from the statute of frauds, must be based upon a consideration: The plaintiff furnished none, and the lumber which had been before placed in defendant's hands upon a different consideration, furnished none. After this promise the defendant's interest in the lumber, and control thereof, were no greater than before.

But the counsel for the plaintiff strenuously contends that the promise of the defendant is without the statute of frauds, and founded upon a sufficient consideration, simply because Ward & McVicker placed in defendant's hands property upon trust to pay this debt; and there are some general expressions in reported cases which, literally taken, support this construction.

In *Mallory v. Gillett*, 21 N. Y. 412, Judge Comstock says that when the debtor puts a fund into the hands of the promisor, either by absolute transfer or upon a trust to pay the debt, the promise to pay it is not within the statute of frauds. This general language needs some limitation or explanation. If the promise in such case be made to the debtor in consideration of the transfer, it is no doubt valid. If it be made to the creditor after it has become the duty of the promisor under his arrangement with the debtor to pay, then it

is valid; as if in this case, Bender had converted the property into money, and then promised the plaintiff to pay the debt, he could have been sued directly on such promise. That would have been an original promise to discharge his own obligation to the plaintiff. As said by Judge COMSTOCK in that case: "The law would imply an obligation on the defendant's part to pay over the money to the plaintiff after selling the goods; and when the law will imply a debt or duty against any man, his express promise to pay the same debt, or perform the same duty, must in its nature be original." POLAND, Ch. J., in *Fullam v. Adams*, 37 Vt. 391, after laying down the rule in substantially the same language as that used by Judge COMSTOCK, says the true principle why the promise to the creditor in such a case is valid is, that "the party making the promise holds the funds of the debtor for the purpose of paying his debt, and, as between him and the debtor, it is his *duty* to pay the debt, so that when he promises the creditor to pay it, in substance he promises to pay his own debt, and not that of another." Throop, in his work on Verbal Agreements, vol. 1, p. 535, lays down the rule as follows: "When the promisor absolutely controls the fund, but his application thereof to the payment of the debt due to the promisee will acquit him of a *duty* which he owed to the person who furnished it, the promise is not within the statute." Here the defendant owed Ward & McVicker no duty to pay the debt. The only duty he owed them was to convert the property and apply the proceeds upon the debts specified. When this action was commenced he was not in any default in the discharge of that duty, and the action was not brought upon such a theory.

To test this case further. Suppose a voluntary assignee of an insolvent debtor after he had taken possession of the property assigned, but before he has converted it into money, and before the duty to pay has arisen, promises without any further or new consideration to pay the debt of one of the preferred creditors, could such a promise be enforced? Suppose one takes a conveyance of real estate from a debtor upon the agreement with him that he will rent it, and accumulate the rent for ten years, and then pay the net amount to his creditors, and the next day without any new consideration he promises at once to pay the creditors, could such a promise be enforced? These cases are analogous to the one in hand, and no authority, certainly no case that would be regarded as authority in this State, can be found which would authorize the

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enforcement of such promises. They would be void at common law as without any consideration, and void also under the statute of frauds as not in writing.

But we can go one step farther in this case. Even if the promise had been made after the defendant had converted the proceeds, it could have been enforced against him only to the extent of the proceeds applicable to this debt. *Ardern v. Rowney*, 5 Esp. 254. If the amount applicable to this debt had been less than the \$1,000, then for the excess of the debt the promise would have been without consideration. Defendant in such a case would have owed the duty to pay the plaintiff his share of the proceeds, and his promise to that extent would have been valid as one to discharge his own obligation. But his promise for more would, as to the excess, not have been to pay anything for which he was liable in any way, but to pay the debt of Ward & McVicker, and hence within the statute of frauds. Here the complaint was not framed, and the trial was not conducted, for a recovery upon such a theory. There was no proof that the property was sufficient to pay the \$1,000, but on the contrary, the proof showed that it was not sufficient.

The plaintiff's counsel upon the argument claimed that the case of *Young v. French*, 35 Wis. 111, was very much in point in his favor. But in that case there was a new consideration for the promise sued on, moving from the plaintiff to the defendant, and hence that case is unlike this.

It is difficult to perceive how the doctrine of waiver can apply in a case like this. A person may waive some act or condition which another is to perform to or for him. He may choose to pay a debt before due; but in a legal sense he waives nothing by so doing. Here, however, there was no debt of the defendant, and he could not by such a waiver, if we call it such, based upon no consideration, impose upon himself an entirely new obligation.

It follows, therefore, that the order of the general term must be affirmed, and judgment absolute rendered against the plaintiff, with costs.

All concur.

Order affirmed and judgment accordingly.

PEOPLE v. MANN.

(25 N. Y. 484.)

Criminal law — forgery — unauthorized county bonds.

A county treasurer, without authority, issued and negotiated instruments for the payment of money, purporting in the body to be the obligations of the county, but signed only by him in his own name, with the addition, "treasurer." *Held*, not to be forgery, the same not "being or purporting to be the act of another" within the statute.

CONVICTION of forgery. The defendant was county treasurer of Saratoga county, and, without authority, made the instrument, of which the following is a copy which the payee discounted, he receiving the proceeds:

"No. —

SARATOGA COUNTY TREASURER'S OFFICE,
BALLSTON SPA, *June 16, 1875.*

"In pursuance of a resolution passed November, 1874, by the board of supervisors of Saratoga county, the county of Saratoga promises to pay at the Saratoga county treasurer's office, on or before the 15th of February, 1876, to the First National Bank of Ballston Spa, or bearer, \$10,000, at seven per cent interest, value received.

"\$10,000.

HENRY A. MANN,
"Treasurer."

Ezek Cowen, for plaintiff in error. The defendant was properly convicted of forgery in the third degree. *Noakes v. People*, 25 N. Y. 380, 384; *People v. Stearnes*, 21 Wend. 409; 23 id. 637; *Queen v. Ritson*, L. R. 1 C. C. 200; *People v. Graham*, 6 Park. Cr. 135; *Rez v. Parkes*, 2 East P. C. 963; *Barfield v. State*, 29 Ga. 127; *People v. Peacock*, 6 Cow. 72.

Nathaniel C. Moak, for defendant in error.

RAPALLO, J. The statute under which the defendant in error was convicted defines the offense of forgery in the third degree to be, so far as applicable to this case, falsely making or altering, with intent to defraud, any instrument or writing "being or purporting to be

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the act of another" whereby any pecuniary demand shall be or purport to be created, etc.

We cannot adopt the interpretation of this statute claimed by the counsel for the people. He contends that one who without authority makes an instrument purporting in its body to be the contract or obligation of a county, though he signs his own name to it as the official representative of the county, comes within the purview of the act. That the words "purporting to be the act of another" are synonymous with "purporting to be the contract or obligation of another." We think that the "act" referred to in the statute is the making of the instrument, and that the offense consists in falsely making an instrument purporting to be made by another. The offense intended to be defined by the statute is forgery, and not a false assumption of authority. One who makes an instrument signed with his own name, but purporting to bind another, does not make an instrument purporting to be the act of another. The instrument shows upon its face that it is made by himself and is in point of fact his own act. It is not false as to the person who made it, although by legal intendment it would, if authorized, be deemed the act of the principal, and be as binding upon him as if he had actually made it. The wrong done, where such an instrument is made without authority consists in the false assumption of authority to bind another, and not in making a counterfeit or false paper.

Supposititious cases have been ingeniously suggested for the purpose of showing that unless the construction claimed is adopted, forgeries of corporate names and of the names of joint stock companies might not be reached by the statute. It will be time to deal with those cases when they arise. It is sufficient, for the purposes of the present case, that the instrument which the defendant is charged with having forged, purports, on its face, to have been made by himself and not by any other person.

The judgment of the general term should be affirmed.

All concur, except HAND, J., not voting.

Judgment affirmed.

National Bank of Auburn v. Lewis.

NATIONAL BANK OF AUBURN v. LEWIS.

(75 N. Y. 516.)

National bank — usury — set-off — accommodation indorser.

Under the national bank act, in an action upon a note usuriously discounted by a national bank, the amount of the usury may be set off by an accommodation indorser, although the note does not carry interest on its face.

ACTION on a promissory note. Defense of usury by an accommodation indorser. The defense was excluded. The opinion sufficiently discloses the points. The plaintiff had judgment below.

Rollin Tracy, for appellant.

E. H. Avery, for respondent. None of the facts alleged constituted or worked a forfeiture of any of the interest paid by the makers. 12 U. S. Stat. 99, § 30; *Hasbrouck v. Paddock*, 1 Barb. 635; *Hintermister v. First Nat. Bk.*, 64 N. Y. 215. Usurious interest paid by the makers of a note cannot be recovered back by the indorser or allowed by way of defense or set-off in an action against him. *Nash v. White's Bk. of Buffalo*, 68 N. Y. 396; 2 R. S., tit. 3, §§ 3, 4; 12 Stat. 99, § 30; *Marine Bk. of Buffalo v. Fiske*, 9 Hun, 363; 2 R. S. 354, § 18, subd. 1, 2; *Kingston Bk. v. Gay*, 19 Barb. 459; *Lafarge v. Halsey*, 4 Abb. 397; *Rice v. Milks*, 7 Barb. 340; *Almy v. Harris*, 5 Johns. 175; *Stafford v. Ingersoll*, 3 Hill, 38.

MILLER, J. The first question for consideration upon this appeal is whether the answers of the defendant state facts sufficient to establish the defense of usury if proven.

[Omitting this consideration.]

The facts stated in the answers referred to were amply sufficient, if proven, to make out a corrupt and usurious agreement; and the offer of proof presented the distinct question whether the interest paid was forfeited or could be allowed by way of set-off against or in rebatement of the plaintiff's demand.

As to the forfeiture of the interest under the act of congress, we think it is quite clear that the facts stated by the pleadings establish

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a case within the meaning and intent of the act, and that the taking and receiving of illegal interest, under the circumstances, is available as a defense, by way of set-off or rebatement, in an action brought on the note claimed to have been usuriously discounted. The provision, section 5198, which declares a forfeiture, is penal in its character, and we concede, should be strictly construed, and not held to include any alleged violation that is not clearly within the plain intention of the act. Nor should it be enlarged by implication, but confined within its legitimate scope and object. Having due regard to this rule, we think, a forfeiture of the interest means that it shall be lost to the lender, and that it shall be refunded, if required, when "taken in advance," as is authorized by section 5197, or otherwise received; and such forfeiture may be enforced when a suit is brought upon the note or obligation, and the recovery restricted to the actual sum loaned. Such a construction is placed upon the sections cited in some of the reported cases. In *Hintermister v. First National Bank of Chittenango*, 64 N. Y. 212, 215, ALLEN, J., in construing the provisions cited, says: "That this forfeiture attaches and is enforced only in actions brought upon or to enforce the usurious contract. It limits the right of recovery in such actions to the money actually loaned without interest." In the State of Pennsylvania, it is held, in several cases, that when an action is brought by a national bank, upon notes discounted at a usurious rate of interest, when the defense of usury is interposed, the bank can only recover the sum actually loaned or advanced, and the entire interest is forfeited, and may be set-off against the demand. *Brown v. Second National Bank of Erie*, 72 Penn. 209, 213; *Overholt v. National Bank of Mt. Pleasant*, 82 id. 490; *Lucas v. Gov. National Bank of Pottsville*, 78 id. 228; *S. C.*, 21 Am. Rep. 17; see, also, *National Bank of Madison v. Davis*, Thomp. Nat. B. Cas. 350.

It is said, that under section 5198, interest can only be forfeited when the note carries interest with it, and the excessive rate of interest has been agreed to be paid. Such a construction would restrict a recovery to cases where the note bears interest upon its face only, and I think, is not sanctioned by a fair interpretation of the law. If the interest has been paid in advance, as is authorized by law, then, within the meaning of the statute, that interest is carried with the note, and has been agreed to be paid upon the same. It is enough that it has been taken, received or charged to create a forfeiture, as is held in the opinion, which analyzes the different sections of the

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act, in *F. and M. Nat. Bank v. Dearing*, 1 Otto, 29, and as is also fully sustained in the cases to which we have referred. The effect of the construction contended for would be to render the law inoperative and of but little avail, as interest, in transactions of this kind, is usually paid in advance, as authorized, and cannot be upheld upon any sound rule applicable to the interpretation of statutes of this description.

The right of an accommodation indorser, without consideration, to the same benefit as the makers would have under the national banking act, by way of set-off or rebatement of the interest usuriously taken on notes discounted, is, I think, well settled. The first indorser is not a party in the action. It does not appear that the makers have been served with process; and the recovery here is sought against the second indorser alone. He is called upon to pay the entire demand; and upon principle, there appears to be no reason why he is not entitled to the same defenses, as the maker may have. Section 5198 declares that there shall be a forfeiture, without confining it to the maker; and it is a reasonable presumption that it should be for the benefit of any one who might be compelled to pay the obligation. We think it certainly applies to a party who has been sued upon the note and against whom alone a remedy is sought, by an action to recover the amount of the same. That the indorser is entitled to the benefit of this provision is also decided in several cases. *In re Wild*, 11 Blatchf. 243, Wild was the indorser, without consideration, and a mere surety of the notes in question, which were given in renewal of prior notes held by a national bank; and it was laid down by Woodruff, Circuit Judge, that the loan being made reserving a compensation exceeding seven per cent interest per annum, "the transaction in question was within the prohibition of the national banking law, and that the bank, *eo instanti* it made the loan, upon the terms exacted, incurred the forfeiture of the entire interest which the notes received, carried with them, or which was agreed to be paid thereon." See, also, *Nat. Ex. Bank of Columbus v. Munroe*, 2 Bond. C. C. 170; *Brown v. Second National Bank of Erie*, 72 Penn. 209; *Cake v. First National Bank of Lebanon*, 86 Penn. St. 303.

The moment usurious interest is taken or charged, the forfeiture is established; and as the cases hold, any party to the transaction may avail himself of it, if payment is sought to be enforced against him. Under the usury laws of this State the term "borrower" includes

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any person who is a party to the original contract, or in any way liable to pay the loan. *Wheelock v. Lee*, 64 N. Y. 247; *Bissell v. Kellogg*, 65 id. 432; *Livingston v. Harris*, 11 Wend. 329; *Post v. Bank of Utica*, 7 Hill, 391. Applying the same principle, the person by whom the usury is paid, or his legal representative, may well be regarded as including the indorser. The right to set off the usury taken, or to rebate the note to that extent, in this case, does not rest upon the same principle as the statutes in regard to that subject, in this State, but upon the construction of the act of congress, which, as we have seen, is held in the reported cases cited, to authorize such a defense by the indorser, when sued upon the note. It is enough that when called upon to pay, such right exists, without considering the question, which is not now before us, whether the indorser can maintain an action to recover back the interest paid by the maker, before he has paid the demand.

In the case at bar, the entire line or series of notes discounted, which are stated at length in the sixth defense, constitute one connected and continuous transaction; and under such circumstances, the taint of usury affects the whole, and when the bank sues to recover upon the last of a series of renewal notes, the forfeiture of the entire interest follows as a necessary result, and credit must be given for all the interest which has been paid from the beginning on the loan. *Overholt v. National Bank of Mt. Pleasant*, *supra*; *Tutill v. Davis*. 20 Johns. 286; *Cake v. First National Bank of Lebanon*, *supra*; *Brown v. Second National Bank of Erie*, *supra*.

The defendant was clearly entitled, upon the trial, to introduce evidence showing the taking of usury upon the various notes described in the answers; and the court erred in rejecting the various offers made, relating to the same.

For the errors referred to the judgment must be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

Berkshire Woolen Company v. Juillard.

BERKSHIRE WOOLEN CO. v. JUIILLARD.

(75 N. Y. 585.)

Partnership — bond of partners, for partnership purposes, executed in individual names.

An obligation under seal executed by all the members of a firm, in and for its business, and for its benefit, binds the firm, although the firm name is not mentioned, and although it appears upon its face to be simply the obligation of the partners contracted in their individual names.

ACTION in the nature of a creditor's bill. The opinion sufficiently states the facts.

Thomas H. Hubbard, for appellant. The signing of the names of all the partners individually did not constitute a signing of the firm name. Pars. on Part. 178; *Gates v. Graham*, 12 Wend. 53; *Van Deusen v. Blum*, 18 Pick. 229.

Charles M. Da Costa, for respondent.

RAPALLO, J. The bond upon which the banks found their claim against the copartnership assets of the firm of Hoyt, Spragues & Co. is executed by all the six members of that firm, and purports to be their joint obligation, as well as the several obligation of each of them. It also purports to create a joint obligation on the part of any two or more of them. The only aspect in which it is necessary to consider it on this appeal, is as the joint obligation of all the members of the firm, and the question presented is whether it can be enforced as a copartnership obligation against the copartnership assets, notwithstanding that the firm name is not mentioned therein, but it appears on its face to be simply the joint obligation of the copartners, contracted in their individual names, and is under seal.

We are of opinion that notwithstanding the form of the instrument, if it was executed in the business of the firm and for its benefit, it should be regarded as a copartnership obligation payable out of the copartnership funds.

In the present case it is quite clear from the proofs that the transaction in which the bond was given was for the benefit of the firm

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of Hoyt, Spragues & Co., and that all but a fraction of the sum advanced by the banks on the credit of the bond was paid over by them to that firm, and applied on account of its claims against the Riverside Mills and the City Woolen Company. The loan from the banks to Chapin was negotiated by Mr. Gallup, one of the firm of Hoyt, Spragues & Co., in behalf of that firm, as he testifies. The two companies last named being indebted to Hoyt, Spragues & Co. in a million of dollars, for which indebtedness Mr. Chapin was surety, Mr. Gallup negotiated the arrangement whereby the banks agreed to loan to Mr. Chapin the sum of \$600,000 on his notes for that amount, secured by mortgage on his real estate and the collateral guaranty of the bond in question executed by all the members of the firm of Hoyt, Spragues & Co. All this was done to enable Chapin to reduce the debt for which he was surety to Hoyt, Spragues & Co., and accordingly he gave that firm orders on the several banks for their respective proportions of the loan of \$600,000, all of which sums were paid to and receipted for by Hoyt, Spragues & Co. except the first six months interest in advance, which was retained by the banks, and the sum of about \$55,000 of the principal sum loaned, which Hoyt, Spragues & Co. do not appear to have received. The form of the bond is peculiar but seems to have been contrived for the purpose of giving to the banks power to enforce it against either the joint or separate estates of the members of the firm of Hoyt, Spragues & Co. or any of them, as might prove most to the interest of the banks. From the nature of the transaction we think it must have been the intention of the parties that the firm should be bound, and that the individual names of all the partners were used for the reason that the instrument was under seal, and that a several as well as joint liability was desired. We can see no objection to a firm binding itself in that form, where the transaction is one for the account of the partnership and all the partners unite in the act; while it would be in the highest degree inequitable to deny to the creditors whose funds have under such circumstances gone into and increased the copartnership assets, the right of resorting to those assets for repayment.

When funds or property are obtained on the obligation of only a portion of the members of a firm, the fact that the property thus obtained goes to the use of the firm is not of itself sufficient to render the firm liable. But where the property is not only obtained for and applied to the benefit of the firm, but is so obtained by the joint act

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and upon the joint written obligation of all its members, and the credit is given to all, the transaction is in substance a copartnership transaction, though the firm name is not actually used in the writing and though the partners may have superadded to their joint obligation the several liability of each of them. The cases cited on the part of the appellant in support of the proposition that the joint obligation of all the members of a firm is not equivalent to an obligation of the firm do not sustain that proposition, where the transaction is in the business or for the benefit of the firm. In *Forsyth v. Woods*, 11 Wall. 486, the reasoning is strictly confined to an obligation contracted by the members outside of the partnership business and proceeds wholly on the ground that the firm property should be applied in the first instance to the payment of debts incurred for the benefit of the partnership, as its property presumably consists of what has been obtained from its creditors. In *Turner v. Jaycox*, 40 N. Y. 470, I do not understand, from the note of the reporter, anything more than that the majority of the court declined to hold as a general proposition that a note signed by all the members of a firm was the same as one signed by the firm. That nothing more was decided is apparent from the judgment, which sustained the note in that case as a copartnership debt. In *In re Weston*, 12 Metc. 1, the decision is placed upon the ground that the partners had signed as sureties and there was no evidence that it was a partnership transaction. In *Ex parte Stone*, L. R. 8 Chan. App. 914, 917, where the obligation was shown to have been given for money borrowed for partnership purposes, it was allowed to be proved against the partnership estate though signed and sealed by the partners as individuals without naming the firm.

We think it sufficiently appears in this case that the purpose of the transaction was to raise money from the banks, to be paid to the firm of Hoyt, Spragues & Co., for which loans Chapin and his property were to be primarily liable to the banks, and that the bond now in question was given by the members of the firm to induce the banks to make the loan, so that the firm might receive the avails in part payment of the claims for which Chapin was liable to them as surety, and that these circumstances are sufficient to justify the allowance of the claims of the banks against the copartnership.

The orders should be affirmed, with costs out of the fund.

All concur.

Orders affirmed.

KROMER v. HELM.

KROMER v. HELM.

(75 N. Y. 574.)

Accord and satisfaction — part execution and tender of residue.

An accord must be completely executed to sustain a plea of accord and satisfaction; part execution and tender of performance of the residue is insufficient.

MOTION by defendant to set aside an execution, and have the judgment satisfied of record. The judgment was obtained June 24, 1876, for \$4,334.08. On July 26, 1876, pending a stay of execution, plaintiff's attorney executed and delivered to defendant a written stipulation, to accept, in settlement, if paid within a year, \$3,000 in cash, and an assignment of certain patent rights and interests of defendant, or \$1,000 in money, \$250 down and the balance in installments, and merchandise in amounts stated, sufficient, with the cash payments, to reduce the judgment to \$1,000, and an assignment of said patent interests. Defendant paid the \$250 down, and made the other cash payments and deliveries of merchandise until the judgment was reduced to less than \$1,000, which were received by plaintiff without objection. Defendant then tendered to plaintiff an assignment of the patent interests as required, which plaintiff declined to accept. The motion was denied.

D. M. Porter, for appellant. The contract of settlement was valid. *Bigelow v. Benedict*, 70 N. Y. 202; *S. C.*, 26 Am. Rep. 573; *Story v. Salmon*, Ct. of App. MS.; *Justice v. Lang*, 42 N. Y. 493; *S. C.*, 1 Am. Rep. 576; *Argus Co. v. Mayor*, 55 id. 495. The acceptance of part performance, pursuant to the proposition, made the contract valid. *Allis v. Read*, 45 N. Y. 142; *Allis v. Read*, id. 143; *Dent v. North Am. S. S. Co.*, 49 id. 391; *Bissell v. Balcom*, 39 id. 284; *Osborn v. Gantz*, 60 id. 540; *Gaylord Mnfg. Co. v. Allen*, 53 id. 515. On the facts proved the judgment was fully paid. *Eaves v. Henderson*, 17 Wend. 190; *Davis v. Spencer*, 24 N. Y. 386, 391, 392; *Hartley v. Tatham*, 1 Robt. 246; 2 Abb. Ct. App. Dec. 338. Upon part performance by appellant the agreement could be enforced against him. *McKnight v. Dunlop*, 1 Seld. 537; *Garfield v. Paris*, U. S. Sup. Ct., 17 Alb. Law J. 467; *Morton v. Tibbett*, 15

Ad. & El. (N. S.) 434. The delivery of property, even of the smallest value, would be good as an accord and satisfaction. *Sibree v. Tripp*, 15 M. & W. 23-25, 35-38; 2 Pars. on Cont. (5th ed.) 618, 619, *n. z.*; *Smith v. Brown*, 3 Hawks, 580; *Christie v. Craige*, 20 Penn. 430; *Grocers' Bk. of N. Y. v. Fitch*, 1 Thomp. & Co. 651; 58 N. Y. 623; *Howard v. Norton*, 65 Barb. 161; *Philips v. Berger*, 2 id. 608; *Kellogg v. Richards*, 14 Wend. 116; *Steinman v. Magnus*, 2 Camp. 124; *Legh v. Lewis*, 1 East, 390; Comyn's Dig., "Accord," b. 2; 2 Rol. 96; *Boyd v. Hitchcock*, 20 Johns. 76-78; *Brooks v. White*, 2 Metc. 283; *Henderson v. Moore*, 5 Cranch, 11; *Worthington v. Wigley*, 3 Bing. (N. C.) 454; *Good v. Cheeseman*, 2 B. & Ad. 328; *Lynn v. Bruce*, 2 H. Bl. 317; *Lyth v. Ault*, 7 Exch. 669; *Jones v. Bullett*, 2 Litt. 49; *Blinn v. Chester*, 5 Dey, 359; *Curlewis v. Clark*, 3 Exch. 375; *Peytoe's Case*, 5 Rep. 117; *Andrew v. Boughay*, Dyer, 756; *Watkinson v. Inglesby*, 5 Johns. 385; Pars. on Cont. (5th ed.) 683, *n.* 12; *Musgrove v. Gibbs*, 1 Dall. 216; *Coit v. Houston*, 3 Johns. Cas. 243; *Payne v. Barnet*, 2 Marsh, 312.

J. W. Feeter, for respondent.

ANDREWS, J. "Accord," says Sir WM. BLACKSTONE, "is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions upon this account." 3 Bl. Com. 15. An accord executory without performance accepted is no bar, and tender of performance is insufficient. Bac. Abr., tit. Accord and Satisfaction, C. So, also, accord with part execution cannot be pleaded in satisfaction. The accord must be completely executed to sustain a plea of accord and satisfaction. Bac. Abr. Accord and Satisfaction, A; *Cock v. Honeychurch*, T. Ray. 203; *Allen v. Harris*, 1 Ld. Ray. 122; *Lynn v. Bruce*, 2 H. Bl. 317. In *Peytoe's Case*, 9 Co. 79, it is said: "And every accord ought to be full, perfect and complete, for if divers things are to be done and performed by the accord the performance of part is not sufficient but all ought to be performed." The rule that a promise to do another thing is not a satisfaction is subject to the qualification that where the parties agree that the new promise shall itself be a satisfaction of the prior debt or duty, and the new agreement is based upon a good consideration, and is accepted in satisfaction, then it operates as such, and bars the action. *Evans v. Powis*, 1 Exch. 601; *Kissler v. Pope*, 5 Strobb. 126; Pars. on Cont. 683, note.

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An exception to the general rule on this subject has been allowed in cases of composition deeds, or agreements between a debtor and his creditors; and they have been held, upon grounds peculiar to that class of instruments, to bar an action by a separate creditor, who had signed the composition to recover his debt, although the composition agreement was still executory. *Good v. Cheeseman*, 2 B. & Ad. 335; *Bayley v. Homan*, 3 Bing. (N. C.) 915. The doctrine which has sometimes been asserted that mutual promises which give a right of action may operate and are good, as an accord and satisfaction of a prior obligation, must, in this State, be taken with the qualification that the intent was to accept the new promise, as a satisfaction of the prior obligation. Where the performance of the new promise was the thing to be received in satisfaction, then, until performance, there is not complete accord, and the original obligation remains in force. *Russell v. Lytle*, 6 Wend. 390; *Daniels v. Hallenbeck*, 19 id. 408; *Hawley v. Foote*, id. 516; *Brooklyn Bank v. De Grauw*, 23 id. 342; *Tilton v. Alcott*, 16 Barb. 598.

Applying the well-settled principles governing the subject of accords to this case, the claim that the plaintiff's judgment is satisfied cannot be maintained. There is no ground to infer that the agreement of July 26, 1876, was intended by the parties to be, or was accepted as, a substitute for or satisfaction of the plaintiff's judgment. It was, in effect, a proposition on the part of the plaintiff, in the alternative, to accept \$3,000 in cash, if paid within one year, and the assignment of the patent and avails of the patent business, in full of the judgment of \$4,334.08, or to accept \$1,000 in cash, in installments, and the balance in merchandise, until the judgment should be reduced to \$1,000, and for that balance to accept the assignment of the patent interests.

The defendant had the election between the alternatives presented by the plaintiff. He elected the latter, and paid the \$1,000, and supplied the merchandise, until the debt was reduced to \$1,000, and then tendered the assignment of the patent interests, which the plaintiff refused to accept.

The judgment clearly was to remain in force until the satisfaction under the new agreement was complete. It is the case of an accord partly executed. So far as the plaintiff accepted performance, his claim was extinguished. So far as it was unexecuted, the judgment remained in full force; and however indefensible in morals it may

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be for the plaintiff to refuse to abide by the agreement in respect to the patent interests, he was under no legal obligation to accept the assignment tendered, and he had the legal right to enforce the judgment for the balance remaining unpaid.

It is clear that the right to supply the merchandise was for the benefit of the defendant. The plaintiff gave him the option to pay \$3,000 in cash, and assign the patent interests, or to pay \$3,334.08 in merchandise and assign the patent interests. The merchandise was to be furnished on "as favorable terms as would be allowed by Hoyt & Co., or New York rates for cash sales." It gave the plaintiff no benefit beyond what he would derive by any purchase in the open market of the same kind of goods. It is quite clear that the defendant preferred to pay \$3,334.08 in merchandise, to paying \$3,000 in cash.

We think that no distinction arises upon the circumstances to take the case out of the general rule, that an unexecuted accord cannot be treated as a satisfaction.

The order should be affirmed.

All concur.

Order affirmed.

DE LAVALLETTE V. WENDT.

(73 N. Y. 572.)

Evidence — to explain receipt — interest on damages.

An instrument in this form: "Received of A \$500 due on demand," is open to parol explanation of its consideration, to show that it was intended as a mere receipt.

In an action for breach of a contract to hire rooms for a certain time at an agreed price, interest must be awarded upon the recovery, as matter of law. (See note, p. 498.)

ACTION of damages for breach of a contract between plaintiff and David M. Peyser, defendant's testator, by which Peyser agreed to hire rooms in plaintiff's hotel from September 1, 1866, to May 1, 1867, at sixty-two dollars and fifty cents per week up to November 1, 1866, and \$150 per week after that time.

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Defendant's answer set up a counter-claim on an instrument, of which the following is a copy:

"\$500.00.

NEW YORK, November 3, '66.

"Received from D. M. Peyser five hundred dollars. Due on demand.

"A. M. DE LAVALLETTE."

Plaintiff pleaded the statute of limitations.

Peyser left plaintiff's hotel November 23, 1866. He paid for the rooms up to November seventh. Plaintiff's evidence tended to show that \$500 of such payment was made November 3, 1866; that no other sum was received by him from Peyser on that date, and that the instrument was intended as a receipt. On December 21, 1866, plaintiff let the rooms to another for \$125 per week.

Defendant's counsel requested the court to charge that the legal effect of the instrument was an acknowledgment by the plaintiff that she owed the testator \$500, due to him on demand; and that parol evidence was not admissible to vary its effect. The court declined so to charge.

The court charged that the plaintiff was entitled to recover, if at all, \$1,841.48 (\$150 per week for the time the rooms were vacant, and twenty-five dollars per week — the difference between what Peyser agreed to pay and what plaintiff let the rooms for — from December 21, 1866, to May 1, 1867), with interest on the aggregate sum from May first to the time of trial. The plaintiff had judgment below. This was modified by the general term by deducting \$868.28, stated to be the amount of the damages allowed for the time the rooms were vacant, with the interest thereon.

Further facts appear in the opinion.

Charles Wehle, for appellant. Interest on the amount of the claim could only be allowed from the commencement of the action. *McCullom v. Seward*, 62 N. Y. 318. It was error to allow any interest. *Sedg. on Dam.* (6th ed.) 377-380; *Holmes v. Rankin*, 17 Barb. 454; *Salter v. Parkhurst*, 2 Daly, 240; *Esterly v. Coe*, 1 Barb. 235; 3 N. Y. 502. The judge properly held that the meaning of the contract was a question of law. 2 Pars. on Con. 255, 492; *Engleston v. Knickerbacker*, 6 Barb. 466 · 2 C. & H. Notes, 1439; *Tisloe v. Graeter*

1 Blackf. 358. The statute of limitations has no bearing upon the due-bill. *Merritt v. Todd*, 23 N. Y. 28; 3 Para. on Con. 91.

Edward M. Shepard, for respondent.

HAND, J. (Omitting a formal matter.)

There was no error in allowing upon the twenty-five dollars a week (from 21st December, 1866, to 1st May, 1867, aggregating \$464.28, interest from May 1, 1867, to the day of trial. At the close of the term for which the testator had hired the rooms, he was liable to the plaintiff for this sum, easily ascertainable and certain, because to be ascertained readily by mere computation. The amount received by the plaintiff for the rooms, during this period, was then fully known to her. The defendant knew that he was liable for the \$150 a week for this period, less the former amount; and this he could have learned by inquiry from her or her tenant.

It is not a case, therefore, where the amount due was unliquidated and uncertain, in the sense to prevent the accruing of interest thereon. The agreement by the testator was to pay a fixed sum, all of which was payable on or before the 1st of May, 1867, except as reduced by the deduction of the sums received by the plaintiff for the use of the rooms during the time. This balance, we think, comes within the principle of the ruling in *Van Rensselaer v. Jewett*, 2 Comst. 135, as a sum for the non-payment of which, in pursuance of his contract, the defendant was, after May 1, 1867, in default, and liable to indemnify the plaintiff for such default, by the payment of interest. See *Adams v. Ft. Plain Bank*, 36 N. Y. 255. Whether the case was one where the jury might, in their discretion, allow interest, as damages for the default of the defendant, or one in which the plaintiff was entitled, as matter of law, absolutely to interest, is not, perhaps, necessary to decide, as the question was not distinctly raised. But we are inclined to think that the plaintiff was entitled absolutely to interest upon the sum due upon the 1st May, 1867. *Dana v. Fiedler*, 2 Kern. 40.

There could be no recovery by the defendant, or set-off in his favor, arising out of the instrument put in evidence by him, dated November 3, 1866, for if it is to be regarded as a note or due-bill, payable on demand, the statute of limitations had completely barred it, at the time of the commencement of this action. *Herrick v. Wolverton*, 41 N. Y. 581, S. C. 1 Am. Rep. 461; *Howland v. Edmonds*,

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24 id. 307; *Mason v. Ins. Co.* 13 Wend. 267; *Newman v. Kettelle*, 13 Pick. 418.

The judge's refusal of the ninth request to charge that the defendant was entitled to recover its amount was therefore correct. It is insisted, however, that the judge erred, in leaving to the jury the question whether this instrument was a due-bill, or a receipt, and instructing them that their finding, upon this matter, would bear very strongly upon the issue submitted to them, upon conflicting evidence, as to what the contract sued upon by the plaintiff really was.

The point is not without difficulty, but we have come to the conclusion that the judge was right in holding this paper open to explanation as to its consideration and the circumstances under which it was given. It is not, on its face, unequivocal or complete, as a promise to pay. Its language is, "received of D. M. Peyser five hundred dollars due on demand." It names no payee, not even the bearer, and would, in form, be as much a receipt as a note, and more a certificate of deposit, perhaps, than either. But evidence was given, without objection, from which the jury might find, and must be deemed to have found, that it was made when the testator paid the plaintiff the amount specified in it, already due for board and rooms, and hence was without consideration as a due-bill or note, but really intended by the plaintiff and taken by the testator merely as a receipt, or memorandum of money paid, on account.

The authorities, in my opinion, permit this explanation, and justify the course of the judge. The consideration of a promissory note is open to inquiry, as between the original parties; and under this principle, upon the payment of money due, the giving of a note to the debtor by the creditor, upon such payment, it has been held, may be shown to have been intended as a receipt. *Smith v. Rowley*, 34 N. Y. 367; *Slade v. Halsted*, 7 Cow. 322; *Bank of Troy v. Topping*, 9 Wend. 273. In the present case, the proof showing that the consideration of the note (if a note) was money paid to the maker by the payee as her due, the result would be the same whether it were called a receipt or a note. In either view, no cause of action could arise thereon to the payee, for the precise amount secured to be paid to him appears, at the same time, to have been due from and paid by him to the maker, and hence, while the debt owing to the maker is paid, no consideration for the note made by her remains. The other exceptions taken upon the trial have been examined, but do not appear to have any merit, or to require any comment.

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The result is that there should be an affirmance of the judgment, were it not for an error appearing, in the computation of interest, in the judgment, as modified by the general term. The interest on the principal sum of \$464.28, from the 1st May, 1867, to the day of the trial (the 28th February, 1877), seems to have been computed in the judgment, as finally entered, so that the total amount, as of March 5, 1877, the date of the original judgment, was \$975.70, thus more than doubling the principal, in less than ten years. The judgment should be so modified as to reduce it to the sum of \$464.28, and interest thereon to the 28th February, 1877, making the sum of \$783.59; and as so modified and entered, as of the date of its original entry, 5th March, 1877, affirmed, with costs of this court.

All concur.

Judgment accordingly.

NOTE BY THE REPORTER. — On the subject of interest on damages, see *Leeds v. Broun*, 73 N. C. 123; *S. C.*, 28 Am. Rep. 309, and note, 314.

In *Watts v. Miller*, N. Y. Ct. App., October 14, 1879, an action for breach of warranty on sale of seed, it was held that interest is not allowable from the commencement of the suit. The court said, in substance: The law in this State as to the allowance of interest in common-law actions is in a very unsatisfactory condition. The decisions upon the subject are so contradictory and irreconcilable that no certain rule for guidance in all cases can be deduced from them. The common-law rule, as expounded in England, allowed interest only upon mercantile securities, or in those cases where there had been an express promise to pay interest, or where such promise was to be implied from the usage of trade. *Mayne on Damages* (2d ed.), 105; *Higgins v. Sargent*, 2 B. & C. 349; *Gordon v. Swan*, 12 East, 419; *Callon v. Bragg*, 15 id. 223; *Walker v. Constable*, 1 B. & P. 306; *Carr v. Edwards*, 8 Starkie, 182; *Nichol v. Thompson*, 1 Campb. 52; *Trelawney v. Thomas*, 1 H. Bl. 308. But a more liberal rule has been adopted here, and the sole fact that a demand has not been liquidated is not a bar to an absolute legal right to interest. The following cases cited show the present and uncertain state of the law upon the subject. *Van Rensselaer v. Jewett*, 2 N. Y. 135; *Dana v. Medler*, 12 id. 40; *McMahon v. N. Y. and E. R. Co.* 20 id. 463; *Adams v. Fort Plain Bank*, 36 id. 255; *Mygatt v. Wilcox*, 45 id. 306; *Smith v. Valie*, 60 id. 106; *McCollum v. Seward*, 62 id. 316; *Mercer v. Vose*, 67 id. 56. The cases of *Feeler v. Heath*, 11 Wend. 479; *McCollum v. Seward*, *supra*; *Mercer v. Vose*, *supra*; *Barnard v. Bartholomew*, 22 Pick. 291; *Ames v. Wilson*, 22 Me. 116, tend to show that where an account for service rendered or for goods sold and delivered which has become due and is payable in money, although not strictly liquidated, is presented to the debtor, he is put in default, and interest is set running, and that if not demanded before, the commencement of the suit is a sufficient demand to set the interest running from that date. But there is no authority for holding in a case like this, where the claim sounds purely in damages, is unliquidated and contested, and the amount so uncertain that a demand cannot set the interest running, that it can be set running by the commencement of an action. If interest as a legal right can be allowed in this case from the commencement of the action, it must be allowed in all actions *ex contractu* and could not be refused in actions *ex delicto*.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

HILL v. SHIELDS.

(81 N. C. 280.)

Negotiable instruments — evidence — agreement between payee and his immediate indorsee.

In an action upon a note by a remote indorsee, who purchased *bona fide* for full value and without notice, against the payee who indorsed the note in blank, evidence of an agreement between the payee and his immediate indorsee that the former should not be held liable on his indorsement is not admissible, and the plaintiff holds the note unaffected by such agreement.*

ACTION on a promissory note. The facts appear in the opinion. The plaintiff had judgment below.

R. B. Peebles, for plaintiff.

W. H. Day and *Batchelor & Son*, for defendant, cited *Wright v. Latham*, 3 Murp. 298; *Davis v. Morgan*, 64 N. C. 570; *Runyon v. Clark*, 4 Jones, 52; *Baucom v. Smith*, 66 N. C. 537; *Crossley v. Ham*, 13 East, 498; 12 E. C. L. Rep. 420; *Harris v. Burwell*, 65 N. C. 584.

DILLARD, J. From the case of appeal sent up to this court the case is that defendant was payee in a promissory note executed to him by Edward Anderson, payable at twelve months for a large sum of money and secured by a mortgage on property, and on the

* See *Rodney v. Wilson* (67 Mo. 163), 39 Am. Rep. 499, to same effect.

23d day of January, 1875, after its dishonor, he transferred the same by a blank indorsement thereon to the Mercantile Bank of Norfolk, which carried with it the mortgage as an incident, and the bank afterwards transferred the same to the present plaintiff by delivery for full value. After receiving several payments on the note and realizing all the proceeds of the property conveyed in the mortgage there still remained a balance unpaid on the note, and for that this action was brought.

On the trial in the court below the plaintiff tendered the issue, "was the plaintiff a *bona fide* purchaser of said note for full value and without notice?" Defendant admitted the affirmative of that issue and tendered, on his own behalf, the following issues:

1. Did defendant and the bank, when the former indorsed the note in blank, agree that defendant was not to be held responsible on his indorsement?

2. Did any consideration pass from the bank to defendant for his indorsement?

The plaintiff objected to said issues upon the ground that an affirmative response thereto could in no way affect the liability of the defendant to the plaintiff, who was admitted to be a remote indorsee for full value and without notice, and his honor being of opinion with the plaintiff on the objection refused to submit the said issues and thereupon pronounced judgment, upon said admission of defendant and other facts not denied in the pleadings, for the plaintiff for the unpaid balance of his debt, from which judgment the appeal is taken.

The question presented by the appeal for our determination is, does the plaintiff, a remote indorsee of defendant's note put into circulation past due, hold the same subject to the special agreement of defendant with the Mercantile Bank, his immediate indorsee, not to hold him responsible on his indorsement, the plaintiff being a purchaser for full value and without notice of the alleged special agreement?

We concur in the opinion of his honor that the plaintiff held the legal title to the note unaffected by the special agreement between the defendant and the bank supposing such agreement to have been made.

A promissory note, by statute of 3 and 4 Anne in England and by statute in this State, is made negotiable as inland bills of exchange, and the legal title may be passed by indorsement thereon in full or

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in blank, absolute or restricted, in honor or dishonor, with incidents, however, to the holder and to the parties to the note raised by the fact of its being made before or after its maturity. If acquired before due, by the law merchant, the holder takes the title clear of all objections; but if after, he is put on inquiry and is held to take subject to all equities and legal defenses of the maker at the date of the transfer, or before notice thereof, against the payee, under the English law, but against the payee and all intermediate holders, under our Code as decided in the case of *Harris v. Burwell*, 65 N. C. 584.

This liability of the holder of overdue paper to equities and legal exceptions extends only to those that the maker has, as explained above, but does not apply as between the holder and others taking before him by indorsement, except between the holder and his immediate indorser. There is no adverse presumption from the paper being in dishonor as between successive indorsers, as there is between the holder and the maker. Each indorser, including the payee down the line, has, and passes, the legal title, and his indorsement in legal import is a contract with his indorsee and all subsequent holders by indorsement, that the maker will pay the note, or on notice he will. *Parker v. Stallings*, Phil. 590; *National Bank of Washington v. Texas*, 20 Wall. 89, SWAYNE's opinion.

Here the defendant put the paper overdue afloat with his name merely written on the back, and that in legal effect passed the title to the Mercantile Bank and gave it the unqualified power of disposing of the same; and imported a promise to the bank, and not only to it but to the plaintiff, a subsequent indorsee, that the maker would pay the note, and if he did not, that he, the defendant, would. 2 Parsons on Bills, 23. The indorsement being in blank and the contract implied by law with his indorsee and subsequent holders giving such unqualified power as we have seen, it has been much debated and variously decided as to the competency of the indorser by parol proof to rebut the implication of the law and to annex a qualification when none is expressed.

It is settled in this State, however, that parol testimony may be adduced under a blank indorsement to annex a qualification or special contract as between the immediate parties. *Davis v. Morgan*, 64 N. C. 570; *Mendenhall v. Davis*, 72 id. 150. But between the indorser in blank and remote parties without notice, the weight of authority is that parol proof is inadmissible, and the contract implied

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by law stands absolute. 2 Pars. Notes and Bills, 28; *Hill v. Ely*, 5 S. & R. 363; 1 Dan. on Neg. Inst. §§ 699 and 719.

In treating of this subject, Daniel, in his work on Negotiable Instruments, says a parol agreement in the indorsement of a note to the effect that the transfer should be without recourse on the indorser, cannot be interposed as a defense against a subsequent *bona fide* holder without notice; nor would the case be varied by the fact that the transfer was to such a holder by delivery, and that he declared on the prior indorsement as though made to him. 1 Dan. Neg. Inst., § 699.

It appears in the case that the plaintiff purchased the notes of the Mercantile Bank, and it is admitted by defendant it was for full value and without notice of the special agreement between him and the bank as to his alleged non-responsibility; and the defendant having by this act put it into the power of his immediate indorsee to circulate the paper to the plaintiff, upon the faith of an absolute responsibility on his part as imported by his indorsement, ought not to be allowed, in our opinion, by parol to vary the legal effect of his indorsement as against this plaintiff. To this extent the principle decided in *Parker v. Stallings*, *supra*, goes. There the payee indorsed to his attorney for collection merely, but not so expressed in the terms of the indorsement, and the attorney indorsed to a stranger for value and without notice of the special purpose of the indorsement, and the indorser sought to escape liability to the holder by proof of the circumstances of the indorsement, and the court, in the course of their opinion, say, the payer, "who puts a note in circulation ought no more to be protected from the claim of a subsequent *bona fide* purchaser for value, than would be the indorser of a bill of exchange not yet due as against an innocent holder for value." And they further say, promissory notes overdue being by law assignable, "the unchecked circulation of them must be upheld by the same principles as are applied to bills of exchange."

It seems to us, therefore, that the defendant having indorsed the note in blank, and thereby put it into the power of his indorsee to impose on the plaintiff by relying on the legal import of the indorsement, ought not to be allowed as against the plaintiff, a purchaser for value and without notice, to make proof of the alleged special agreement, and in that aspect of the case it was immaterial to have any response by the jury to the issues tendered by the defendant.

No error.

Affirmed.

Whitaker v. Smith.

WHITAKER V. SMITH.

(81 N. C. 340.)

Constitutional law — laborer's lien — overseer not "laborer."

A farm overseer is not a "laborer" within the constitutional provision giving to mechanics and laborers a lien on the subject of their labor for their compensation.

ACTION for services and to enforce a laborer's lien. The opinion states the facts. The plaintiff had judgment for the sum claimed for services, but it was held that he had no lien on the crops, etc., of defendant to secure payment of the judgment.

J. H. Flemming, for plaintiff.

Thos. N. Hill, for defendant.

ASHE, J. This was an action to recover of the defendant services rendered by the plaintiff as overseer during the year 1877, and to enforce what is claimed to be a laborer's lien upon the crops, stock, farming utensils, and plantation of the defendant. A document was filed with the clerk of the Superior Court of Halifax county, purporting to be a notice of lien, which is as follows:

"Know all men by these presents that I, Jesse E. Whitaker, of the county of Halifax and State of North Carolina, commenced work by verbal contract with James N. Smith, on the first day of January, 1877, as overseer and farm superintendent at the rate of five hundred dollars per year, and worked as per contract until the first day of January, 1878; that said Smith is indebted to me for said services in the sum of five hundred dollars, no part or portion thereof has been paid. I file this as my lien against the crops raised, and the stock, farming utensils used on the river farm of the said Smith, and against the lands of said Smith, that is to say, his river plantation whereon I performed said services the said year 1877. Witness my hand and seal, this 5th of January, 1878.

(Signed)

"J. E. WHITAKER. [Seal.]"

The facts of the case were submitted to the court as upon a case agreed, and among other things it was submitted that "if the court

shall be of opinion either that the plaintiff has no lien on said land or crops, or having had one, lost it by failing to comply with the statute, it will so declare." The court held that the plaintiff had no lien upon the crops and other property of the defendant, from which judgment the plaintiff appealed to this court.

And the only question presented by the appeal is whether an overseer is entitled to a laborer's lien for his wages upon the crops, stock, etc., of his employer, and also upon the plantation over which he had superintendence.

In article 14, section 4 of the Constitution, it is provided that the general assembly shall provide by proper legislation for giving to mechanics and laborers an adequate lien on the subject-matter of their labor; and in pursuance of the injunction of the Constitution, the legislature passed the act of 1868-'69, chapter 117, entitled "An act to create a mechanics and laborers' lien" and as amendatory of the same the act of 1870, chapter 206, entitled "An act for the protection of mechanics and other laborers, materials," etc.

A very large proportion of the laboring population of the State had just recently been released from thralldom and thrown upon their own resources, perfectly ignorant of the common business transactions of social life, and this provision of the Constitution and the acts passed to carry it into effect, were intended to give protection to that class of persons who were totally dependent upon their manual toil for subsistence. The law was designed exclusively for mechanics and laborers.

Who then was a laborer in the meaning of these acts and the Constitution?

Words in a Constitution or statute which have a technical meaning are supposed to be used in that sense; but if not, then in their ordinary sense or common acceptation. Worcester defines a laborer to be one who labors, one regularly employed at some hard work; and Webster's definition is, one who labors in a toilsome occupation, one who does work that requires little skill, as distinguished from an artisan. In a Georgia case, *Adams v. Goodrich*, 55 Ga. 335, a laborer was held to be one who performs *manual* labor. In Pennsylvania an action was tried involving the construction of a statute of that State to prevent the wages of laborers from being liable to attachment in the hands of their employers; and the court decided that the word "laborer" used in the statute meant *manual laborer* by profession and occupation. *Heebner v. Chave*, 5 Penn. St. 117. And in

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another Pennsylvania case the question arose whether an engineer on a railroad was a laborer within the meaning of a statute of that State which gave a lien to contractors, laborers, and workmen upon railroads and other works and property of public corporations; and the court held that he was not within the purview of the act; that a laborer was one who toils, who is dependent upon his *manual* labor for his subsistence. *Penn. R. R. Co. v. Leuffer*, 84 Penn. St. 168; *S. C.*, 24 Am. Rep. 189. In the common use of the word, we mean one who toils, one who labors with his hands. But an overseer is an agent, a superintendent, a sort of "*alter ego*." His business is not to labor but to oversee those who do work in subjection to his authority. He might in special cases unite both capacities, and be both laborer and overseer; but in this case he was only overseer. He so describes himself in his pretended notice of lien, and it is expressly stated in the case as made up for this court, that he did not perform any labor except to supervise and superintend the farm and laborers. Such a person does not come within the meaning of the Constitution or acts of the legislature giving protection to laborers.

There is no error. Let this be certified, etc.

No error.

Affirmed.

CAPEHART V. SEABOARD AND ROANOKE RAILROAD COMPANY.

(51 N. C. 438.)

Carrier—limitation of liability—provision for adjustment of claim for damage.

A stipulation in a bill of lading given by a common carrier, that in case any claim for damage should arise for the loss of articles mentioned in the receipt, while *in transit* or before delivery, the extent of such damage or loss shall be adjusted before removal from the station, and claim therefor made in thirty days to a "trace agent" of the carrier, is an unreasonable provision which the courts will not uphold. (*See note, p. 509.*)

ACTION of damages for injury in transit to cotton, which defendant as a common carrier had contracted to carry. The defendant relied on a special contract appended to the bill of lading, wherein it was stipulated "that in case any claim should arise from any damage or loss of articles mentioned in this receipt while *in transitu*, or

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before delivery, the extent of such damage or loss shall be adjusted in the presence of an officer of the line before the same be removed from the station, and such claim must be sent within thirty days after the damage or loss occurred, to James McCarrick, trace agent, Portsmouth, Virginia, who has authority to settle such claims." The opinion states other facts. Defendant had judgment below.

W. W. & R. B. Peebles, for plaintiff.

D. A. Barnes, S. J. Wright and Gilliam & Gatling, for defendant, cited *Capehart v. R. R. Co.*, 78 N. C. 294; *Bailey v. Pool*, 13 Ire. 404; *State v. Revels*, Busb. 200.

ASHE, J. The only question presented for our consideration in this case is, did the court below render the proper judgment upon the finding of the jury? We think it did not, and that the judgment should have been in favor of the plaintiff.

The jury found by their verdict the facts that the cotton when delivered to the defendant was in good order; that when delivered to the plaintiff's consignee it was wet, muddy and damaged; that it was damaged while in the possession of the defendant by its negligence or that of its agents or servants; that the damage to the cotton was not contributed to in any part by the negligence of the plaintiff; that the amount of damage to the cotton was \$1,225.

Upon the finding of these facts the plaintiff was clearly entitled to a verdict for the amount of the damages ascertained by the jury. The defendant was a common carrier and liable for all damages of goods intrusted to it for transportation, during the carriage, from whatsoever cause, except from the act of God or the public enemy. It was an insurer and was liable without any negligence on its part.

But the jury also found that there was a special contract, and the defendant insisted, and so the court held, that as the plaintiff did not comply with the conditions of the contract, it was exonerated from all liability for the damages resulting from its negligence. The right of a common carrier to limit or diminish his general liability by a special contract, has given rise to as much if not more discussion and contrariety of opinion, than any other question of law. Most of the more recent cases hold that common carriers may restrict their general liability by notice brought home to the knowledge of the owner of the goods, before or at the time of the delivery to the

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carrier, if assented to by the owner. 2 Red. on Railw. 100. And it has been held that the receipt of the bill of lading by the shipper or his agent with restrictive stipulations annexed, is presumptive evidence of assent, though on this there has been a diversity of opinion, as upon every other branch of this subject; some of the courts going so far as to hold that a bill of lading, with the receipt in large letters and the stipulations in small print, is an insufficient notice. However this may be, it is certainly a mode of giving notice that is not to be commended.

The jury have found that there was a special contract, and the inquiry is, what effect has that upon the general liability of the defendant as a common carrier? Has the plaintiff lost his right of action against the defendant by reason of his having failed to have the extent of the damage adjusted in presence of an officer of the line before the removal of the cotton, and not presenting his claim for damages within thirty days as prescribed in the "stipulations?" The leading case on this subject is *New Jersey Nav. Co. v. Merchants Bank*, 6 How. 344, which Mr. Redfield, in his valuable work on the Law of Railways speaks of, as giving a fair exposition of the American law upon the subject. In that case, Mr. Justice NELSON said: "The special agreement in this case, under which the goods were shipped, provided that they should be conveyed at the risk of Harn-den, and that the respondents were not to be responsible to him or his employees in any event for loss or damages. The language is general and broad, and might very well comprehend every description of risk incident to the shipping. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence or want of ordinary care. * * * Although he was allowed to exempt himself from losses arising out of events and accidents, against which he was a sort of insurer, yet as he had undertaken to carry the goods from one place to another, he was deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and was therefore bound to use ordinary care in the custody of the goods and their delivery."

To the same effect is the case of *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, which was a case where the bill of lading had stipulations or conditions attached restricting the liability of the company, among which was one "that the company would not be

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liable for any such loss, unless the claim therefor should be made in writing at this office within thirty days from the date, in a statement to which this receipt shall be annexed." The court there held that an exception in its bill of lading that the express company is not to be liable in any manner or to any extent for any loss, damage or detention of its contents, or of any portion thereof, occasioned by fire, does not excuse the company from liability for the loss of such package by fire, if caused by the negligence of a railroad company, to which the former had confided a part of the duty it had assumed. Public policy demands that the right of the owner to absolute security against the negligence of the carrier and all persons engaged in performing his duty, shall not be taken away by any reservation in his receipt, or by any arrangement between them and the performing company.

In *Wyld v. Pinkford*, 8 M. & W. 443, the Court of Exchequer decided that the carrier, notwithstanding his notice, was bound to use ordinary care. In *Bodenham v. Bennett*, 4 Price, 31, followed and approved by *Birkett v. Willan*, 2 B. & Ald. 356, it was decided that notices restricting the liability of a common carrier were only intended to exempt carriers from extraordinary events, and were not meant to exempt from due ordinary care.

We might cite a number of cases in the courts of different States of this country, establishing the principle that a common carrier cannot by special notice or contract exempt himself from the exercise of ordinary care and prudence in the carriage of goods. In addition to those already cited, we refer to the cases of *Camden and Amboy R. R. Co. v. Baldauff*, 16 Penn. St. Rep. 67; *Dorr v. Steam Nav. Co.*, 4 Sandf. 136; *Parsons v. Monteath*, 13 Barb. 353; *Bingham v. Rogers*, 6 W. & S. 495; *Jones v. Voorhees*, 10 Ohio, 145; *School District v. R. R. Co.*, 102 Mass. 552; Story on Bailments, § 571.

But we are not without authorities in our own State maintaining the same doctrine: This court held in the case of *Smith v. N. C. R. R. Co.*, 64 N. C. 235, "that although a common carrier cannot by a general notice to such effect free itself from all liability for property by it transported, yet by notice brought to the knowledge of the owner it may reasonably qualify its liability as common carrier, and in such case it will remain liable for want of ordinary care, i. e., negligence." And to the same effect is the case of *Glenn v. R. R. Co.*, 63 N. C. 510.

From the examination of the authorities on this subject, we con-

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clude that a common carrier cannot by special notice brought home to the knowledge of the owner of goods, much less by general notice, nor by contract even, exonerate himself from the duty to exercise ordinary care and prudence in the transportation of goods; and we deduce from the principles enunciated by them, the following propositions:

1. That a common carrier being an insurer against all losses and damages, except those occurring from the act of God or the public enemy, may by special notice brought to the knowledge of the owner of goods delivered for transportation, or by contract, restrict his liability as an insurer, where there is no negligence on his part.

2. That he cannot by contract even limit his responsibility for loss or damage resulting from his want of the due exercise of ordinary care.

And now that railways have become so numerous, and as carriers have absorbed so much of that class of business which is so important to our increasing commerce and the more frequent intercourse of our people, to hold a different doctrine would lead to the abolition of those safeguards of life and property, which public policy demands shall be preserved and protected.

"The jury having found that there was negligence on the part of defendant, we must take that as a fact, and adhering to the principles established in the cases cited, we are of the opinion that the defendant's liability for damages is not diminished or affected in any way by the notice or contract annexed to the bill of lading, not even by the stipulation that the damages must be adjusted before the removal of the goods from the station and the presentation of the claim for payment within thirty days; for the stipulation must be reasonable; and we do not think it is reasonable to require the consignees of a car load of cotton to cut into the bales before they are received to ascertain whether they have been seriously damaged. 'A contract restricting the responsibility of the carrier must be reasonable in itself, and not calculated to ensnare or defraud the other party. A contract requiring notice of losses in thirty days is not reasonable.' *Adams Express Co. v. Reagan*, 29 Ind. 21; *So. Ex. Co. v. Caperton*, 44 Ala. 101; S. C., 4 Am. Rep. 118; *Place v. Union Ex. Co.*, 2 Hilt. 19."

NOTE BY THE REPORTER. — *Contra*: see *Southern Express Co. v. Hunnicutt* (54 Miss. 566), 24 Am. Rep. 385. In *Adams Express Co. v. Reagan*, 29 Ind. 21, it was held that a condition that the carrier should not be liable for any loss, unless a claim was presented within thirty

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days after shipment, was void. The shipment was to Savannah, Georgia, during the war, when transportation was much interrupted. The court said: "The conditions must be reasonable in themselves, and not such as will operate as a snare and a fraud upon the public." "In the case under consideration, the company, in a shipment of a package sent from Clayton, in this State, to Savannah, Georgia, at a time when the country was in an unsettled condition, occasioning great delays in shipments, and in the transmission of the mails, attempt to incorporate into their contract a condition precedent, that they will not answer for any loss or damage, unless the claim therefor shall be presented to them, at their office at the former place, within thirty days after the date of the receipt; thus placing it in their power, by a delay which perhaps under the circumstances, would not have been unreasonable, to prevent any claim for loss or damage, however gross might have been their negligence. We think the stipulation in question void as being against public policy."

In *U. S. Express Co. v. Harris*, 51 Ind. 127, there was a condition that any claim must be presented within thirty days from the date of the receipt, at the office of shipment. The shipment was at Pittsburgh, Penn., for Jonesboro, Ind. The court say: "We know of no reason why this stipulation is not binding and valid between the parties." "It seems to us . . . reasonable." They lay stress on the fact that the transportation would ordinarily be completed in a day or two, and cite *Southern Express Co. v. Caldwell*, and *Weir v. Express Co.*, *infra*. They distinguish *Adams Express Co. v. Reagan* on the ground of the peculiar circumstances of that case.

In *Southern Express Co. v. Caperton*, 44 Ala. 101; *S. C.*, 4 Am. Rep. 118, the condition was that the claim should be made, at defendant's receiving office, in writing, within thirty days from the date of the receipt, with the receipt annexed. The transportation was to be from Stevenson to Huntsville, Ala. On this point the court simply said: "He cannot be allowed to make a statute of limitations so short as to be capable of becoming a means of fraud. Thirty days might elapse before the consignee became aware that anything had been consigned to him, especially if he was absent from home. It was the duty of the defendant to deliver this package to Mr. Cruise, and it is more than unreasonable to allow it to appropriate the property of another by a failure to perform a duty, and that, too, under the protection of a writing signed only by its agent, the assent to which by the other party is only proven by his acceptance of the paper." The court queried whether the paper constituted a special contract.

In *Weir v. Express Co.*, 5 Phila. 855, the condition was that claim must be made within thirty days after the time when the property had or ought to have been delivered. The particular facts are not disclosed. The court say: "This is a very reasonable and proper provision to enable the defendants, while the matter is still fresh, to institute proper inquiries, and furnish themselves with evidence on the subject. The defendants do a large business, and to allow suits to be brought against them, without such notice, at any length of time, would be to surrender them bound hand and foot to almost every claim that might be made. It would be next to impossible, when a thousand packages, large and small, are forwarded by them daily, to ascertain anything about the loss of one of them at a distance of six months or a year."

In *Express Co. v. Caldwell*, 21 Wall. 264, a condition that the claim must be made within ninety days from delivery to the company, was held reasonable where the time required for the transportation is not long, as in that case a single day. The court said: "Policies of fire insurance, it is well known, usually contain stipulations that the insured shall give notice of a loss, and furnish proofs thereof within a brief period after the fire, and it is undoubted that if such notice and proofs have not been given in the time designated, or have not been waived, the insurers are not liable. Such conditions have always been considered reasonable, because they give the insurers an opportunity of inquiring into the circumstances and amount of the loss, at a time when inquiry may be of service. And still more, conditions in policies of fire insurance that no action shall be brought for the recovery of a loss unless it shall be commenced within a specified time, less than the statutory period of limitations, are enforced, as not against any equal policy. *Riddlebarger v. Hartford Ins. Co.*, 7 Wall. 386.

"Telegraph companies, though not common carriers, are engaged in a business that is in its nature almost if not quite as important to the public as that of carriers. Like common carriers they cannot contract with their employers for exemption from liability for the consequences of their own negligence. But they may by such contracts, or by their rules and regulations brought to the knowledge of their employers, limit the measure of their responsibility to a

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reasonable extent. Whether their rules are reasonable or unreasonable must be determined with reference to public policy, precisely as in the case of a carrier. And in *Wolf v. Western Union Telegraph Company*, 62 Penn. St. 83; *S. C.*, 1 Am. Rep. 387, a case where one of the conditions of a telegraph company, printed in their blank forms, was that the company would not be liable for damages in any case where the claim was not presented in writing within sixty days after sending the message, it was ruled that the condition was binding on an employee of the company who sent his message on the printed form. The condition printed in the form was considered a reasonable one, and it was held that the employee must make claim according to the condition, before he could maintain an action. Exactly the same doctrine was asserted in *Young v. Western Union Telegraph Company*, 34 N. Y. Superior, 390.

"In *Lewis v. Great Western Railway Co.*, 5 H. & N. 857, which was an action against the company as common carriers, the court sustained, as reasonable, stipulations in a bill of lading that 'no claim for deficiency, damage or detention would be allowed unless made within three days after the delivery of the goods, nor for loss unless made within seven days from the time they should have been delivered.' Under the last clause of this condition the *onus* was imposed upon the shipper of ascertaining whether the goods had been delivered at the time they should have been, and in case they had not, of making his claim within seven days thereafter. In the case we have now in hand the agreement pleaded allowed ninety days from the delivery of the parcel to the company within which the claim might be made, and no claim was made until four years thereafter. Possibly such a condition might be regarded as unreasonable if an insufficient time were allowed for the shipper to learn whether the carriers' contract had been performed. But that he claimed here. The parcel was received at Jackson, Tennessee, for delivery at New Orleans. The transit required only about one day. We think, therefore, the limitation of the defendants' common-law liability to which the parties agreed, as set up in the plea, was a reasonable one, and that the plea set up a sufficient defense to the action."

The court then advert to *Southern Express Co. v. Caperton*, and after describing the case, remark: "It will be observed that it was a much more onerous requirement of the shipper than that made in the present case, and more than was necessary to give notice of the loss to the carrier." "This case is a very unsatisfactory one. It appears to have regarded the stipulation as a statute of limitations, which it clearly was not, and it leaves us in doubt whether the decision was not rested on the ground that there was no sufficient evidence of a contract."

In *Lewis v. Great Western Railway Co.*, *supra*, POLLOCK, Ch. B., said: "Such a condition is perfectly reasonable. The law allows persons to make their own bargains in matters of this sort."

The condition in the principal case, it will be observed, was much more stringent than in any of the cases above reviewed, and it may well be that it was unreasonable even within those cases.

This decision practically overrules the decision in the same case. 77 N. C. 855. There the court, READ, J., said: "We think that it is a reasonable regulation that a claim for damages should be made by the consignee at the delivery station *before* the article is taken away. This is not only reasonable in itself, but under the system of continuous, connecting and co-operating lines of railroads and steamboats it is almost indispensable in order that liability may be fixed upon the proper person by immediately tracing back the article and locating the injury. This is the advantage to the carrier service itself, added to the further advantage that it prevents false claims for injuries after the articles are delivered. The advantage to the public is that it enables and encourages carriers to act as forwarding agents for shippers, thereby dispensing with the necessity for the shippers to have receiving and forwarding agents at the end of every line. This is a great convenience and saving of expenses to shippers which the carriers would not perform if they were not permitted to protect themselves by requiring claims for damages to be made before they part with the article."

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DOBBIN V. RICHMOND AND DANVILLE RAILROAD COMPANY.

(81 N. C. 446.)

Master and servant — negligence of agent — liability of master.

The plaintiff was a train hand employed by the defendant, a railroad company, in digging gravel under the direction of L., who was engineer, superintendent and conductor and master of the gravel and material train of defendant, and who had entire charge of that branch of the business on a section of the railroad, with power to employ and discharge hands. *Held*, that the plaintiff and L. were not mere fellow-servants, and that the plaintiff might recover of defendant for an injury sustained by L.'s negligence.

ACTION of damages for personal injury. The opinion states the case. The defendant had judgment below.

W. H. Bailey, for plaintiff.

J. M. McCorkle, for defendant.

ASHE, J. This is an action brought by the plaintiff against the defendant to recover damages for an injury to his person resulting from the negligence of the defendant. The defendant in the answer denied the allegations of the complaint, and for a further defense insisted that if the plaintiff was injured by the negligence of defendant's employees, superintendent or servants, the defendant was not responsible for the injury received.

The case was submitted to a jury for trial, and the evidence produced disclosed the facts, that the plaintiff was employed as a train-hand and laborer, and at the time of the injury was engaged in digging gravel under the direction of one T. W. Lowrie, and that said Lowrie was engineer, superintendent, conductor and master of the gravel and material train of the defendant, whose business it was to employ and discharge hands connected with the business for which the gravel train was used; also, that he had *entire* charge of this branch of business on his section of the railroad, known as that of digging gravel, putting the same upon the track, digging ditches and repairing the same, and also repairing culverts, etc.

After hearing this evidence, his honor expressed the opinion that

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the plaintiff could not recover, admitting that he was injured by the negligence of said Lowrie, for the reason as he alleged that Lowrie was a mere fellow-servant of the plaintiff.

Who is a fellow-servant within the meaning of the law appertaining to this subject, is a difficult question, one that has never been decided in this State. And so far as we have been able to find, no definition of the relation as a test applicable to all cases, has as yet been adopted by the courts, and we do not think can be, so variant are the relations subsisting between master and servant, principal and agent, colaborer and employee, in the various enterprises and employments, with their numerous and divers branches and departments; the cases frequently verging so closely on the line of demarcation between fellow-servants or colaborers and what are called "middle men," that it is difficult to decide on which side of the line they fall. Each case in the future as heretofore will have to be determined by its own particular facts.

Where the relation of fellow-servants or colaborers is found to subsist, it is well established by the English as well as American authorities, and is conceded in the argument of this case, that the master is not responsible for an injury to one of his servants occasioned by the negligence of a fellow-servant engaged in the same business or employment. This principle has been so universally recognized by the courts, that it may be regarded as a general rule of law. And the reason of the rule is, that where one engages to serve, he undertakes, as between him and his master, to run all the ordinary risks of the service, which includes the risk of the negligence of his fellow-servants, acting in the discharge of his duty as servant of the common master, and engaged in the same common employment. But he does not undertake to incur the risks that may result from the negligence of the master, or such person to whom he may choose to delegate his authority in that branch or department of business in which he is engaged. To impute the negligence of such an agent to the master, he must be more than a mere foreman to oversee a batch of hands, direct their work under the supervision of the master, see that they perform their duty, and in case of dereliction, report them. He must have entire management of the business, such as the right to employ hands and discharge them, and direct their labor and purchase materials, etc. He must be an agent clothed in this respect with the authority of the master, to whom the laborers are put in subordination, and to whom they owe the

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duty of obedience. Such an agent is what is known as a "middle man," who as well as the laborer is the servant of the master, and although he may work with the laborer in furthering the common business of the master, he is yet not a "fellow-servant" in the sense of that term as used by the courts, because he represents the master in his authority to direct, control and manage the business. To such an agency, the maxim of "*qui facit per alium*" applies. His acts are the acts of the master; his duties the duties of the master; and his neglects and omissions the neglects and omissions of the master.

We think this principle clearly deducible from the more recent and most approved adjudications on this subject.

In the case of *Laning v. N. Y. Cent. R. R. Co.*, 49 N. Y. 529; S. C., 10 Am. Rep. 417, it was held that where the business is of such a nature that it is necessarily committed to agents, as in the case of corporations, the principal is liable for the neglects and omissions of duty of one charged with the selection of other servants, in employing and selecting such servants, and the general conduct of the business committed to his care. To the same effect is *Fiske v. Boston and Albany R. R. Co.*, 53 N. Y. 549; S. C., 13 Am. Rep. 545.

In *Corcoran v. Holbrook*, 59 N. Y. 520; S. C., 17 Am. Rep. 323, which was the case where an operative had been injured by the falling of an elevator in consequence of a defect in the chain by which it was operated, the court held that when the master delegates to one agent the performance of duties which he is bound to perform towards his employees, the agent occupies the place of the master, and he is deemed to be present and is liable for the manner in which they are performed.

And in *Brothers v. Cartter*, 52 Mo. 373; S. C., 14 Am. Rep. 424, where the plaintiff was injured by the falling of a bridge, the superintendence of the construction of which had been committed to a head carpenter, it was held if the master deposes the superintending control of the work, with the power to employ hands and purchase and remove materials, to an agent, then the master acts through the agent, and the agent becomes the master, the duties are the duties of the master, and he cannot evade the responsibilities which are incident and cling to them, by thus delegating to another. In such case the agent represents the master, and though in truth he may be and is a servant, yet in those respects, he is not a co-servant, a co-laborer, a co-employee, in the common acceptation of the term. He is an agent and stands instead of the principal, and is not a

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fellow-servant within the meaning of the rule as applied to laborers or workmen.

And again, in the case of *Brickner v. N. Y. Cent. R. R. Co.*, 2 Lans. 506, it was held that the corporation cannot act personally. "It requires some person to superintend structures, to purchase and control the running of cars, to employ and discharge men and provide all needful appliances. This can only be done by agents. When the directors themselves personally act as such agents, they are representatives of the corporation. They are then the executive head or master. Their acts are the acts of the corporation. The duties above described are the duties of the corporation. When these directors appoint some person other than themselves to superintend and perform all these executive duties for them, then such appointee equally with themselves represents the corporation as master in all these respects; and though, in the performance of these executive duties, he may be and is a servant of the corporation, he is not in those respects a co-servant, a colaborer, a coemployee, in the common acceptation of those terms, any more than is a director who exercises the same authority. Though such superintendent may also labor like other colaborers, and may be in that respect a colaborer, and his negligence as such colaborer, when acting as colaborer, may be likened to that of any other, yet when, by appointment of the master, he exercises the duties of master — as in the employment of servants, in the selection for adoption of the machinery, apparatus, tools, structures, appliances and means suitable and proper for the use of the other and subordinate servants — then his acts are executive acts, are the acts of a master, and then corporations are responsible that he shall act with a reasonable degree of care for the safety, security and life of the other persons in their employ. These executive duties may also be distributed to different heads of different departments, so that each superintendent within his sphere may represent the corporation as master. In controlling and directing structures, in employing and dismissing operatives, in selecting machinery and tools, thus he speaks the language of a master. Then he issues *their* orders to *their* operatives. Then he is the mouthpiece and interpreter of their will. Their voice, which is silent, is spoken by him. He then only speaks their executive will, not the irresponsible will of a fellow-workman or colaborer. The corporation can speak and act in no other way. His executive acts are their acts, his negligence is their negligence; his control, their control. He has in his executive

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duty no equal. He is not, while in the performance of these executive duties, only the equal of the common colaborer or coservant. *Harper v. Ind. and St. Louis R. R. Co.*, 47 Mo. 567; *S. C.*, 4 Am. Rep. 358; *Mullan v. Phila. and So. Mail and Steamboat Co.*, 78 Penn. St. 25; *S. C.*, 21 Am. Rep. 2.

We might refer to other decisions, but we think those cited establish the principle which governs the present case. We have examined the authorities cited by the counsel of the defendant, and regret that several of them were inaccessible; but those we have been able to examine do not controvert the general doctrine recognized in the cases heretofore cited, except in the case of *Sherman v. Roch. and Syracuse R. R. Co.*, 17 N. Y. 105. But in that case two of the judges did not sit, and another expressed no opinion. In *Davis v. Detroit and Mil. R. R. Co.*, 20 Mich. 105; *S. C.*, 4 Am. Rep. 364, the cause of action was an injury sustained by a yard-man of the company by the negligence of an engineer who was alleged to be incompetent, and it retained him in service after notice of his incompetency. But the case was decided in favor of the defendant, because plaintiff failed to show that defendant had knowledge of the incompetency of the employee. And the case of *Tindall v. Ohio and Miss. R. R. Co.*, 13 Ind. 366, was where a set of hands were at work for the company graving a part of the track. The same hands loaded and unloaded the cars conveying the gravel, and rode back and forth on the cars. While thus engaged the train, through the alleged carelessness of the engineer, ran against an ox, was thrown off the track, and one of the employees was killed. It was held that the engineer and the deceased were engaged in the same general undertaking, and the representative of the deceased could not recover. The case is not in conflict with those cited above. The person killed and the engineer were colaborers. The engineer had no authority over the laborers.

Applying the principle to be gathered from the current of authorities to our case, we think it is clear that Lowrie was what is termed a middle man; for it was in evidence that he was engineer, superintendent, conductor and master of the gravel and material train, whose business it was to *employ* and *discharge* hands connected with the business for which the gravel train was used, and that he had entire charge of the business on his section of the railroad. He was no colaborer with the plaintiff; he had no equal in this business; he was the representative of the defendant. The laborers engaged in the

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same business were in subordination to his authority, as master *pro hac vice*; they were bound to yield obedience to his commands; and his acts were the acts of the defendant, and his neglects, the neglects of the defendant.

We are of the opinion there is error, and the nonsuit must be set aside. Let this be certified to the Superior Court of Rowan county, that further proceedings may be had in accordance with this opinion and the law.

Error.

Reversed.

 STATE V. HOLDER.

(21 N. C. 227.)

Criminal law — larceny — dog.

Dogs are not the subject of larceny in this State.*

INDICTMENT for larceny of a dog. The indictment was quashed.

Attorney-General, for State.

ASHK, J. The defendant was indicted for stealing a dog. It is no offense at common law. 4 Bl. Com. 236; Arch. Cr. Pl. 175; 1 Hale P. C. 512. The common law is the law of this State except where altered by statute; and we have no statute making it larceny to steal a dog, therefore the indictment cannot be sustained.

There is no error. Let this be certified to the Superior Court of Davidson county.

No error.

Affirmed.

* See *Mayer v. Meigs* (1 McArthur, 55), 20 Am. Rep. 578; *Ex parte Cooper* (3 Tex. Ct. App. 430), 20 Am. Rep. 152.

STATE v. LYON,

(81 N. C. 602.)

Witness — accomplice, rights of, testifying for State.

An accomplice who is introduced as a witness and testifies to the facts within his knowledge, withholding nothing because of its tendency to self-crimination, has an equitable claim to executive clemency, or the solicitor may enter a *nolle prosequi*, but the fact does not constitute a legal defense to a prosecution against him for the same offense. (*See note, p. 522.*)

PETITION for *certiorari*. The facts are sufficiently stated in the opinion.

Attorney-General, for State.

Thos. Ruffin and J. W. Graham, for prisoner.

SMITH, Ch. J. The prisoner, Rebecca Ann Lyon, was examined in the summer of 1877 as a witness upon an inquisition of the coroner's jury into the causes of the death of Nannie Blackwell, and on behalf of the State, before two successive grand juries in Orange Superior Court, on bills of indictment charging Robert Boswell with the murder of the deceased, and again upon his trial at fall term, 1878, before the petty jury by whose verdict he was convicted. At the same term the prisoner herself was indicted for the same crime, as an accomplice, mainly upon the testimony of Robert Boswell, and at spring term, 1879, another bill was found against the prisoner in which she is charged with the murder of one Ned Lyon. The record does not show, nor is it suggested that the testimony was obtained upon any assurances of leniency or favor to be extended to the prisoner or that it was not voluntarily given in. After the verdict was rendered against Boswell, the solicitor proposed to put the prisoner on trial for complicity in the same crime, which her counsel resisted, insisting that by reason of her having been used as a witness on these several occasions, and the materiality of her testimony, she was equitably entitled to be discharged from this prosecution and asked the court so to rule. In answer thereto the court made an order, so much of which as is necessary to a proper understanding of the case

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is as follows: "It further appearing to the court here that the present indictment against the accused charges her with the murder of Nannie Blackwell, of which said offense one Robert Boswell hath been tried at this term, and against whom this accused, Rebecca Ann Lyon, was used and examined as a witness on behalf of the State, it is declared by the court here that it is not just and right that the accused be tried for the crime whereof she now stands indicted, and it is therefore ordered that the said Rebecca Ann Lyon be not put to answer the present indictment and to say whether she be guilty or not guilty of the felony and murder whereof she stands charged."

Upon the announcement of the decision the solicitor remarked that he had other charges against the prisoner and was awaiting the results of an analysis of the contents of the stomach of Ned Lyon, and thereupon the prisoner was remanded to the custody of the sheriff.

At spring term, 1879, the solicitor proposed again to arraign and try the prisoner for the murder of Nannie Blackwell, and on the renewal of the motion of her counsel for an order of discharge, he stated that it was not his intention at the present term to bring on the trial of the charge for the murder of Ned Lyon, if the prisoner was entitled to be discharged from the other indictment. The court refused the motion for the prisoner, but continued the case that she might have time to apply for such relief as her counsel should advise.

This is a summary of the material facts contained in the application for the *certiorari* and in the record sent up in obedience to the writ, and they do not call for or authorize any interference by this court in the proceedings depending in the Superior Court below. It is plain they constitute no legal defense against the prosecution, or if they did, they could be put in proper form and made available at the trial. The prisoner's evidence was not elicited upon any promise or expectation, aside from that produced by the act of examination, of release or other individual advantage to the witness to be derived therefrom; and if such assurance had been given, its only effect would be to influence the solicitor to enter a *nolle prosequi* under a proper sense of official duty, which the court might affirm, but would not undertake to control. The pardoning power after conviction is vested alone in the Governor, and the court can do no more than to forbear and give opportunity to the prisoner to make application to him with a recommendation for its favorable exercise. This is the

practice deduced from an examination of the cases in which judicial action has been invoked. The subject is discussed in one of the series of cases lately determined in the Supreme Court of the United States (*U. S. v. Ford*, not yet reported) tracing the rule of practice from its origin through successive precedents down, and we are content to reproduce some of the authorities cited and views expressed in the very elaborate opinion of the court as delivered by Mr. Justice CLIFFORD: "In the present practice, says Mr. Starkie, when accomplices make a full and fair confession of the whole truth, and are in consequence admitted to give evidence for the crown, if they afterwards give their testimony fairly and openly, although they are not entitled of right to a pardon, the usage, lenity, and practice of the court are to stay the prosecution against them, and they have an equitable title to a recommendation to the King's mercy." 2 Stark. Ev. 15.

"They cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defense on their trial, though it may be made the ground of a motion for putting off the trial in order to give the prisoner time to present an application for executive clemency." Ros. Cr. Ev. 597. "Interviews for the purpose mentioned" (between the prosecuting officer and the accomplice proposing to testify, to ascertain the value and materiality of the evidence) "are for mutual explanation, and do not commit either party, but if the accomplice is subsequently called and examined, he is equally entitled to a recommendation for executive clemency. Promise of pardon is never given in such an interview, nor any inducement held out beyond what the before-mentioned usage and practice of the courts allow."

The difficulty of giving specific effect to the usage from a want of power in the executive (as in this State) to pardon until after trial and conviction may be removed by the exercise of the right vested in the solicitor, when, in his judgment, the case calls for it, to enter a *nolle prosequi* and allow the prisoner's discharge, which practically accomplishes the same ends as the pardon.

The opinion refers to a suggestion of Mr. Bishop that the prisoner may be permitted to plead guilty, under an arrangement with the prosecuting officer that he may "retract his plea and plead one to the merits, if his application for a pardon shall be unsuccessful." 1 Bish. Cr. Proc., § 1006, note. The suggestion does not commend itself to our approval. If the record discloses the entire transaction.

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the application could not be entertained, since there has been no such conviction as the Constitution contemplates; and if the supposed outside arrangement is withheld, it is an attempted evasion of a plain provision of law and makes the record present an incomplete and untruthful statement of the facts. To this no judicial tribunal should be a party. In such case the power to relieve, and the responsibility for its exercise, must remain in the sound discretion of the prosecuting officer, where the law places them.

In the quotation from Starkie it is said the witnesses "must give their testimony *fairly and openly*," and the opinion of the court speaks of the equitable claim of the witness as depending "upon the condition that he makes a *full and fair disclosure of the guilt of himself and that of his associates*." If it be meant by these expressions that the witness must disclose what he knows and withhold nothing because of its tendency to self-crimination, the qualification is wise and proper. But if it be intended to say that the testimony must be full and fair, and of this the court to be the judge, the restriction does not meet our concurrence. It is sufficient if the witness testifies to such facts as are within his knowledge and refuses no material and admissible information which he possesses, whether the evidence be favorable or adverse to the State, to entitle him to the recommendation to executive clemency, since it is the introduction and examination of the witness upon the incriminating facts of the *corpus delicti* that form the basis of his claim, and not the character and effect of the testimony delivered. Any further qualification tends to intensify an eagerness to convict, and weakens confidence in the truthfulness of the evidence.

What has been said applies exclusively to the one prosecution for the murder of Nannie Blackwell. With another indictment pending for a similar crime, while the prisoner is entitled to a speedy trial according to the course of the court, she cannot ask for a discharge. Nor, in our opinion, is the case affected by the order of fall term, 1878. It was not warranted for the reasons assigned, and its operation was suspended, if not neutralized, by the suggestion of the solicitor that there was another charge depending against the prisoner. The application to us for a discharge must be refused and the cause be left in the Superior Court to be proceeded with according to law.

Per Curiam.

Motion refused.

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NOTE BY THE REPORTER. — The case of *U. S. v. Ford*, cited in the principal case, is in harmony with it, but also holds that the prosecuting officer has no authority to agree with the accomplice that he shall not be prosecuted if he will give evidence for the government. The following are the material portions of the opinion :

CLIFFORD, J. Accomplices in guilt, not previously convicted of an infamous crime when separately tried, are competent witnesses for or against each other, and the universal usage is that such a party, if called and examined by the public prosecutor on the trial of his associates in guilt, will not be prosecuted for the same offense, provided it appears that he acted in good faith and that he testified fully and fairly.

Where the case is not within any statute the general rule is that if an accomplice, when examined as a witness by the public prosecutor, discloses fully and fairly the guilt of himself and his associates, he will not be prosecuted for the offense disclosed, but it is equally clear that he cannot by law plead such facts in bar of any indictment against him, nor avail himself of it upon his trial, for it is merely an equitable title to the mercy of the executive, subject to the conditions before stated, and can only come before the court by way of application to put off the trial in order to give the prisoner time to apply to the executive for that purpose. *Ex v. Rudd*, 1 Cowp. 339.

Suppose the plea to be amended, as stipulated at the argument, the first question is whether, as amended, it sets up a good defense to the several actions. Taken in that view it alleges, in substance and effect, that the district attorney promised the defendants that if they would testify in behalf of the United States, frankly and truthfully, when required, in reference to a conspiracy among certain government officials in the internal revenue service and other parties then known to exist, whereby the honest manufacturer of distilled spirits and the collection of the tax thereon had been rendered practically impossible, and would plead guilty to one count in an indictment then pending against them in said District Court, and would withdraw their pleas in certain condemnation cases then pending against their property in said District Court, for the purpose *only* of insuring their good faith in so testifying on behalf of the United States, then the United States would recall any and all assessments under the internal revenue law made against them, and that no more assessments under said law should be made against them; that no more proceedings against them should be commenced on account of violations of the internal revenue laws then passed, and that no penalties or forfeitures should in any manner be enforced or recovered against them or their property; that all suits for penalties and for forfeitures then pending against them and their property should be dismissed, and that full and complete indemnity should be granted to them as the said claimants.

Complete performance on their part is alleged by the claimants, and they allege that the pending suits are for the condemnation and confiscation of their property which was seized by the United States on the ground of the alleged violation of the internal revenue law prior to entering into the said agreement. Assessments made against the claimants or their property are to be recalled and they and their property are to be free of internal revenue taxation. Proceedings pending against them for violations of the internal revenue laws to be dismissed and no more are to be instituted, and the claimants are promised full and complete indemnity, civil and criminal, if they will consent to testify.

Considering the scope and comprehensive character of the supposed agreement it is not strange that the district attorney deemed it proper to demur to the plea. He took two objections to it but the court will examine the second one first, as if that is sustained the other will become immaterial.

Waiving for the present the question whether the district attorney may contract with an accomplice of an accused person, on trial that if he will testify in the case his taxes shall be abated, or that he and his property shall be exempt from internal revenue taxation, the court will consider, in the first place, whether the district attorney, as a public prosecutor, may properly enter into an agreement with such an accomplice that if he will testify fully and fairly in such a prosecution against his associate in guilt he shall not be prosecuted for the same offense, and if so whether such an agreement, if the witness performs on his part, will avail the witness as a defense to the criminal charge in case of a subsequent prosecution.

Considered in its full scope the agreement is that in consideration of the defendants testifying against their coconspirators who were indicted for defrauding the revenue, they, the defendants, should have a full and complete discharge, not only from all criminal liability, but

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from all penalties and forfeitures they had incurred and from liability for their internal revenue taxes which they had fraudulently refused to pay, giving them full and complete indemnity, civil and criminal, for all their fraudulent and illegal acts in respect to the public revenue.

Courts of justice everywhere agree that the established usage is that an accomplice duly admitted as a witness in a criminal prosecution against his associates in guilt if he testifies fully and fairly will not be prosecuted for the same offense, and some of the decided cases and standard text-writers give very satisfactory explanations of the origin and scope of the usage in its ordinary application in actual practice. Beyond doubt some of the elements of the usage had their origin in the ancient and obsolete practice called *approvement* which may be briefly explained as follows: When a person indicted of treason or felony was arraigned he might confess the charge before plea pleaded and appeal or accuse another as his accomplice of the same crime in order to obtain his pardon. Such *approvement* was only allowed in capital offenses and was equivalent to indictment, as the appellee was equally required to answer to the charge, and if proved guilty the judgment of the law was against him, and the *approver*, so called, was entitled to his pardon *ex debito justitiæ*. On the other hand, if the appellee was acquitted, the judgment was that the *approver* should be condemned. 4 Bl. Com. 330.

Speaking upon that subject Lord MANSFIELD said, more than a century ago, that there were three ways in the law and practice of that country in which an accomplice could be entitled to a pardon: First, in the case of *approvement*, which, as he stated then still remained a part of the common law, though he admitted it had grown into disuse by long discontinuance. Secondly, by discovering two or more offenders as required in the two acts of parliament to which he referred. Thirdly, persons embraced in some royal proclamation as authorized by an act of parliament, to which he added that in all these cases the court will bail the prisoner in order to give him an opportunity to apply for a pardon.

Approvers, as well as those who disclosed two or more accomplices in guilt and those who come within the promise of a royal proclamation, were entitled to a pardon; and the same high authority states that besides those ancient statutory regulations there was another practice in respect to accomplices who were admitted as witnesses in criminal prosecutions against their associates, which he explains as follows: Where the accomplice has made a full and fair confession of the whole truth and is admitted as a witness for the crown, the practice is, if he act fairly and openly and discover the whole truth, though he is not entitled of *right* to a pardon, yet the usage, the lenity and the practice of the court is to stop the prosecution against the accomplice, the understanding being that he has an equitable title to a recommendation for the king's mercy.

Subsequent remarks of the court in that opinion showed that the ancient statutes referred to were wholly inapplicable to the case, and that there remained, even at that date, only the equitable practice which gives a title to recommendation to the mercy of the crown. Explanations then follow which prove that the practice referred to was adopted in substitution for the ancient doctrine of *approvement*, modified and modeled so as to be received with greater favor. As modified it gives, as the court said in that case, a kind of hope to the accomplice that if he behaves fairly and discloses the whole truth he may, by a recommendation to mercy, save himself from punishment and secure a pardon, which shows to a demonstration that the protection, if any, to be given to the accomplice rests on the described usage and his own good behavior, for if he acts in bad faith or fails to testify fully and fairly, he may still be prosecuted as if he had never been admitted as a witness. *Re v. Budd*, 1 Cowp. 334; *Same v. Same*, 1 Leach's Cr. L. 119.

Great inconvenience arose from the practice of *approvement*, in consequence of which a mode of proceeding was adopted in analogy to that law by which an accomplice may be entitled to a recommendation to mercy, but not to a pardon as of legal right, nor can he plead it in bar or avail himself of it on his trial. 2 Hawkins' P. C. n. 3, p. 532; 3 Russ. on C. and M. (9th Am. ed.) 506.

In the present practice, says Mr. Starkie, where accomplices make a full and fair confession of the whole truth and are in consequence admitted to give evidence for the crown, if they afterwards give their testimony fairly and openly, although they are not of right entitled to a pardon, the usage, lenity and practice of the court is to stay the prosecution against them, and they have an equitable title to a recommendation to the king's mercy. 2 Starkie's Ev. (4th Am. ed.) 15.

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Particeps criminis in such a case, when called and examined as witnesses for the prosecution, says Roscoe, have an equitable title to a recommendation for the royal mercy, but they cannot plead this in bar to an indictment against them, nor can they avail themselves of it as a defense on their trial, though it may be made the ground of a motion for putting off the trial in order to give the prisoner time to present an application for the executive clemency. Roscoe's Cr. Ev. (9th Am. ed.) 597.

Authorities of the highest character, almost without number, support that proposition, nor is it necessary to look beyond the decisions of this court to establish the correctness of the rule. *Ex parte Wells*, 18 How. 312.

Special reference is made in that case to the three ancient modes of practice which authorized accomplices, when admitted as witnesses in criminal prosecutions, to claim a pardon as a matter of right; and the court having explained the course of such proceedings remarked, that except in those cases accomplices, though admitted to testify for the prosecution, have no absolute claim or legal right to executive clemency.

Much consideration appears to have been given to the question in that case, and the court held that the only claim the accomplice has in such a case is an equitable one for pardon, and that only upon the condition that he makes a full and fair disclosure of the guilt of himself and that of his associates, that he cannot plead it in bar of an indictment against him for the offense, nor use it in any way except to support a motion to put off the trial in order to give him time to apply for a pardon.

Three-quarters of a century before that, ten of the twelve judges of England decided in the same way, holding that the accomplice in such a case cannot set up such a claim in bar to an indictment against him, nor avail himself of it upon his trial, that such a claim for mercy depends upon the conditions before described, and that it can only come before the court by way of application to put off the trial in order to give the party time to apply for a pardon. *Rex v. Rudd*, 1 Leach's Cr. L. 125; 1 Chitty's Cr. L. (ed. 1847) 82; Mass. Cr. L. 175.

Attempt was made sixty years later in the same court to convince the judges then presiding that some of the remarks of the chief justice in *Rex v. Rudd*, before cited, justified the conclusion that the accomplice in such a case was by law entitled to be exempted from punishment, but Lord DENMAN replied that the organ of the court on that occasion was not speaking of legal rights in the strict sense, nor of such rights as would constitute a defense to an indictment or an arrest to the question why sentence should not be pronounced, saying in substance and effect that the right mentioned was only an equitable right that the court would postpone the trial or any action in the case to the prejudice of the prisoner, in order to give him an opportunity to apply to the crown for mercy. *King v. Garside*, 2 Ad. & Ell. 275; *Rex v. Lee*, R. & R. Cr. Cas. 361; *Rex v. Brunton*, id. 454.

Other text-writers of the highest repute, besides those previously mentioned, affirm the rule that accomplices, though admitted as witnesses for the prosecution, are not of right entitled to a pardon, that they have only an equitable right to a recommendation to the executive clemency, and they all hold that prisoners under such circumstances cannot plead such right in bar of an indictment against them nor avail themselves of it as a defense on their trial.

None of those propositions can be successfully controverted, but it is equally clear that the party, if he testifies fully and fairly, may make it the ground of a motion to put off the trial in order that he may apply to the executive for the protection which immemorial usage concedes that he is entitled to at the hands of the executive. 3 Russ. on C. and M. (9th Am. ed.) 597.

Certain ancient statutory regulations, as already remarked, gave unconditional promise to accomplices of pardon and complete exemption from punishment, and in such cases it was always held that the accomplice, if he was called and examined for the prosecution, was entitled as of right to a pardon, provided he acted in good faith and testified fully and fairly to the whole truth. Instances of the kind are adverted to by Mr. Phillips in his valuable treatise on Evidence, but he, like the preceding text-writer, states that accomplices, when admitted as witnesses, under the more modern usage and practice of the courts, have only an equitable title to be recommended to mercy, on a strict and ample performance, to the satisfaction of the presiding judge, of the conditions on which they were admitted to testify, that such an equitable title cannot be pleaded in bar, nor in any manner be set up as a defense to an indictment charging them with the same offense, though it may be made the ground of a motion for putting off the trial in order to allow time for an application to the pardoning power. 1 Phil. Ev. (ed. 1805) 85

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Offenders of the kind are not admitted to testify as of course, and sufficient authority exists or saying that in the practice of the English court it is usual that a motion to the court is made for the purpose, and that the court, in view of all the circumstances, will admit or disallow the evidence as will best promote the ends of public justice. 1 Phil. Ev. (ed. 1868) 87; 3 Russ. on C. and M. (9th Am. ed.) 598.

Good reasons exist to suppose that the same course is pursued in the courts of some of the States, where the English practice seems to have been adopted without much modification. *People v. Whipple*, 9 Cow. 711.

Such offenders everywhere are competent witnesses if they see fit voluntarily to appear and testify, but the course of proceeding in the courts of many of the States is quite different from that just described, the rule being that the court will not advise the Attorney-General how he shall conduct a criminal prosecution. Consequently it is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the State.

Of all others, the prosecutor is best qualified to determine that question, as he is alone supposed to know what other evidence can be adduced to prove the criminal charge. Applications of the kind are not always to be granted, and in order to acquire the information necessary to determine the question, the public prosecutor will grant the accomplice an interview, with the understanding that any communications he may make to the prosecutor will be strictly confidential. Interviews for the purpose mentioned are for mutual explanation and do not absolutely commit either party, but if the accomplice is subsequently called and examined, he is equally entitled to a recommendation for executive clemency. Promise of pardon is never given in such an interview, nor any inducement held out beyond what the before-mentioned usage and practice of the courts allow.

Prosecutors in such a case should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonably expect in case he acts in good faith and testifies fully and fairly as to his own acts in the case and those of his associates. When he fulfills those conditions, he is equitably entitled to a pardon, and the prosecutor and the court, if need be, when fully informed of the facts, will join in such a recommendation.

Modifications of the practice doubtless exist in jurisdictions where the power of pardon does not exist prior to conviction, but every embarrassment of that sort may be removed by the prosecutor, as in the absence of any legislative prohibition he may *vol. pros.* the indictment if pending, or advise the prisoner to plead guilty, he, the prisoner, reserving the right to retract his plea and plead over to the merits if his application for pardon shall be unsuccessful. 1 Bish. Cr. Pr. (2d ed.), § 1076, and note.

Where the power of pardon exists before conviction as well as after, no such difficulties can arise, as the prisoner, if an attempt is made to put him to trial in spite of his equitable right to pardon, may move that the trial be postponed and may support his motion by his own affidavit, when the court may properly insist to be informed of all the circumstances. Power under such circumstances is vested in the court in a proper case to put off the trial as long as may be necessary, in order that the case of the prisoner may be presented to the executive for decision.

Centuries have elapsed since the judicial usage referred to was substituted for the ancient practice of *approvement*, and experience shows that throughout that whole period it has proved, both here and in the country where it had its origin, to be a proper and satisfactory protection to the accomplice in all cases where he acts in good faith and testifies fairly and fully to the whole truth. Cases undoubtedly have arisen where the accomplice, having refused to comply with the conditions annexed to his equitable right, has been subsequently tried and convicted, it being first determined that he has forfeited his equitable title to protection by his bad faith and false representations. *Com. v. Knapp*, 10 Pick. 493. Such offenders, if they make a full disclosure of all matters within their knowledge in favor of the prosecution, will not be subjected to punishment, but if they refuse to testify or testify falsely, they are to be tried and may be convicted upon their own confession.

Nothing of weight by the way of judicial authority can be invoked in opposition to the views here expressed, as is evident from the brief filed by the defendants, which exhibits proof of research and diligence. Decided cases may be cited which contain unguarded expressions, of which the following are striking examples: *People v. Whipple*, 9 Cow. 708; *U. S. v. Lee*, 4 McLean, 108.

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Neither of those cases, however, support the proposition for which they are cited. Enough appears in the first case to show that it was objected on behalf of the accomplice that the usage gave him no certain assurance of a pardon, inasmuch as the power of pardon was vested in the Governor, and the authority of the court extended no further than the recommendation for mercy, to which the court responded that the legal presumption was that the public faith will be preserved inviolate and that the equitable claim of the party will be ratified and allowed.

Public policy and the great ends of justice, it was said in the second case, require that the arrangement between the public prosecutor and the accomplice should be carried out and the court proceeded to remark, that if the district attorney failed to enter a *nolle prosequi* to the indictment, "the court will continue the cause until an application can be made for a pardon," which of itself is a complete recognition of the usage and practice established in the place of the ancient proceeding of *approvement*. More evil than good flowed from that regulation, and in consequence the practice now acknowledged was substituted in its place, under which the accomplice acquires only an equitable right to the clemency of the executive, which, as Lord MANSFIELD said, rests on usage and the good behavior of the accomplice, who, in a proper case, will be bailed by the court in order that he may apply for the pardon to which he is equitably entitled.

Should it be objected that the application may not be successful, the answer of the court must be, in substance, that given by Lord DENMAN on a similar occasion, that we are not to presume that the equitable title to mercy which the humblest and most criminal accomplice may thus acquire by testifying to the truth in a Federal court will not be sacredly accorded to him by the President, in whom the pardoning power is vested by the Federal Constitution.

Having come to the conclusion that the district attorney had no authority to make the agreement alleged in the plea in bar, it follows that the Circuit Court erred in the two cases instituted there in overruling the demurrer to it, and that the judgment must be reversed and the causes remanded for further proceedings in conformity with the opinion of the court.

Tested by these considerations, it is clear that the Circuit Court also erred in affirming the judgment of the District Court in all the other cases, and that the judgment in each of those cases must be reversed and the causes remanded, with directions to reverse the judgment of the District Court, and for further proceedings in conformity with the opinion of the court.

In *State v. Graham*, Supreme Court of New Jersey, April, 1879, 12 Vroom, 15; 8 S. C., 2 Am. Rep. 174, it was held that if an accomplice be convicted after being made a witness by the State and received as such by the court, and after having made an ingenuous confession, such accomplice has an equitable claim to a judicial recommendation to the mercy of the pardoning power which cannot be withheld without a violation of an established rule of practice. Or it is competent for the court to order the accomplice to be acquitted at the trial for the purpose of qualifying him as a witness for the State, or to accept a plea admitting guilt to such a degree as in the opinion of the court is requisite; or for the court to assent to the entering of a *nolle prosequi* by the Attorney-General.

CASES
IN THE
SUPREME COURT COMMISSION
OF
OHIO.

HODGSON v. BARRETT.

(33 Ohio St. 33)

Sale — conditional on payment — check — laches.

Where goods are sold for cash, and delivered, the vendor taking the vendee's check for the price, which on presentment four days thereafter is dishonored the vendor may rescind the contract and reclaim the goods.

REPLEVIN against Zeigler, sheriff, to recover coal levied upon by him as the property of Haubold & Son, by virtue of an execution in favor of Brown. The coal had been sold to Haubold & Son, by the plaintiffs, the terms of sale being one-half cash, balance by promissory note at sixty days. On the day of the sale, Haubold & Son executed and delivered their note for half, and on the following day, for the balance of the purchase-money, gave their check on a Cincinnati bank, payable on demand. The other facts are in the opinion. The plaintiffs had judgment at the trial, which was reversed at general term.

Hoadley, Johnson & Colston, for plaintiff in error.

J. Shroeder and *Moulton, Johnson & Levy*, for defendants in error. The title to the coal passed to Haubold & Son. 2 Kent's Com. 496, 497; *Haskins v. Warren*, 115 Mass. 537; *Caldwell v. Bartlett*, 3 Duer, 341; *Furniss v. Hone*, 8 Wend. 257; *Chapman v*

Lathrop, 6 Cow. 110; *Outram v. Morewood*, 5 T. R. 231; *Upton v. Cotton Mills*, 111 Mass. 453.

SCOTT, J. The question in this case is, whether, under the state of facts shown by the agreed statement, the title to the coal passed unconditionally with the possession to the vendees, in virtue of the contract of sale and delivery; or whether, as between the parties, the vendors had a right to rescind the contract, and reclaim possession of the coal.

This controversy is virtually between the vendors and the vendees; for the rights of the defendant, Barrett, who is the voluntary assignee in bankruptcy of the vendees, are only those of his assignors. No question arises as to the rights of a *bona fide* purchaser for value.

The terms of sale were, one-half cash, and the other half by promissory note at sixty days. The delivery of the coal, and payment therefor, were concurrent conditions of the sale. Plaintiffs could not demand payment till delivery, and upon delivery they had a right to expect present payment. A delivery under such circumstances, without more, is in law conditional; and if payment be not made, the vendor may resume possession of the thing sold. *Wabash Elevator Co. v. First Nat. Bk. of Toledo*, 23 Ohio St. 311, and authorities there cited; Benj. on Sales, §§ 592, 677.

We must therefore regard the delivery mentioned in the agreed statement as conditional only, nothing being stated which would give it a different character. The purchasers proceeded to the execution of the contract, on their part, by making and delivering their promissory note for the deferred payment. For some unexplained reason, the cash payment was not made till the next day. But we cannot infer, from the mere fact that a night intervened before the cash payment was made, that the plaintiffs consented to waive their right to require present payment, or to resume possession of the barge and its cargo, if payment should be refused. Such temporary delay is quite consistent with the idea that the parties intended their respective rights to remain in *statu quo*, until payment should be made. The burden is on the defendant to show that the plaintiffs waived any of their rights under the contract. On the next day the purchasers gave a check on their banker for the cash payment, and on the following day became bankrupts. This was only a conditional payment, which would become absolute if the check was paid on presentation, or if presentation was unreasonably delayed to the

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injury of the drawers. The drawing of this check was a false representation that the drawers had funds sufficient to meet it, in the hands of the drawees; and its acceptance by plaintiffs' agents was not an election to take security instead of cash. The law on this subject is thus stated by Mr. Benjamin, in his treatise on Sales, section 731: "But a man who prefers a check on a banker to payment in money is considered as electing to take a security instead of cash, for a check is accepted as a particular form of *cash payment*, and if dishonored the vendor may resort to his original claim, on the ground that there has been a defeasance of the condition on which it was taken. But if a check received in payment is not presented within reasonable time, and the drawer is injured by the delay, the check will operate as an *absolute* payment." This doctrine is abundantly sustained by the authorities. *Everett v. Collins*, 2 Camp. 515; *Smith v. Ferrand*, 7 B. & C. 19; *Pearce v. Davis*, 1 Moody & Rob. 365; *Hough v. May*, 4 Ad. & Ell. 954; *Small v. Franklin Mining Co.*, 99 Mass. 277; *Weddigen v. Boston Elastic Fabric Co.*, 100 Mass. 422. And on the latter point, *Hopkins v. Ware*, L. R. 4 Ex. 268; *Smith v. Miller*, 43 N. Y. 171; *S. C.*, 3 Am. Rep. 690.

The plaintiffs reside in Pittsburg, and their agents, in Cincinnati, transmitted the check to that point, whence it was returned to a Cincinnati bank for collection, and thus a delay of four days occurred from the date of the check till its presentation for payment. The drawees, for good cause, refused payment. The drawers had no funds in their hands, and were wholly insolvent. The drawees were still solvent, and the drawers sustained no loss by the delay. We cannot infer, from the agreed statement, that the check would have been paid if it had been presented on the day of its date. No state of facts is shown which would have justified the drawers in expecting that it would be honored. They had not then provided, and did not afterward provide, means for its payment, and were otherwise indebted to the drawees. They had assumed to appropriate absolutely a sum of money in their banker's hands, and have no right to complain that the plaintiffs' agents believed in the existence of the fund, and expected it to lie in the hands of the bankers till called for. *Byles on Bills* (6th ed.), 20.

As between the parties, then, upon the dishonor of the check, we think the plaintiffs were clearly entitled to resume possession of the coal. But in the meantime, the coal had passed out of the control of the purchasers, and was in the possession of the sheriff; the pur-

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chasers had made a voluntary assignment of all their property, and were wholly insolvent. Under these circumstances a delay of three or four days occurred before the dishonored check and worthless note of the purchasers were tendered back, and a return of the coal demanded. Whether the plaintiffs' agents, Walton & Co., were still in Cincinnati, or had left that place before the protest of the check, does not appear. Be this as it may, it would be the duty of the Cincinnati bank, which had received the check for collection, to inform its correspondent, at Pittsburg, of its protest. Information of the fact would naturally reach the plaintiffs through a circuitous channel, and they would seem to have lost no time in going to Cincinnati, and asserting their rights. No such delay is shown as would manifest an election not to rescind; nor does it appear that Haubold & Son were in any way injured thereby. It ought not, therefore, to affect the right of plaintiffs to treat the supposed payment by check as a nullity, and wholly to avoid the contract of sale.

The judgment of the court in general term will be reversed, and that of the court in special term will be affirmed.

Judgment affirmed.

ARMLEDER V. LIEBERMAN.

(33 Ohio St. 77.)

Trial — involuntary separation of jury.

A separation of the jurors in a civil case, after the jury has retired to consider of the verdict, induced by a sudden alarm of fire in the vicinity of the jury-room, is not of itself such misconduct as will vitiate the verdict made on reassembling.*

ACTION on account. The opinion states the facts. The plaintiff had judgment, which was reversed on appeal.

David Thomas, for plaintiff in error.

J. H. Marshall, for defendant in error.

* Compare *Early v. State* (1 Tex. Ct. App. 245), 23 Am. Rep. 402.

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ASHBURN, J. Two questions are presented:

I. Whether the District Court erred in reversing the judgment of the Court of Common Pleas, on the ground of alleged misconduct of the jury?

II. If it did, can the judgment of reversal be sustained on consideration of the whole evidence?

I. The alleged misconduct of the jury: 1. By reason of its separation without permission from the court. 2. By reason of a conversation had by one of the jurors when separated from his fellows.

After the jury had retired, in charge of an officer, to the jury-room, to consider the verdict, an alarm of fire was heard. What appeared to be a dangerous fire broke out in a large block of buildings within less than one hundred and fifty feet of the jury-room. Immediately "there was much noise in the court-house and halls; the court-house bell rang an alarm. Suitors, witnesses, members of the bar, the *court*, and officers, rushed in great haste out of the court-house." Seeing and hearing this, the jury rapped, in apparent alarm, and requested the officer in charge to let them out. He did so. "As soon as the fire was extinguished, all of the jurors returned to their room."

W. W. McKnight says, in his affidavit, that he saw two or three of the jurors in the case on the outside of their jury-room, and without the presence of the officer in charge, and standing on the steps in front of the court-house, and mixing with the crowd on the outside.

[Omitting certain facts.]

Section 268 of the Code provides: "When the case is finally submitted to the jury, they may decide in court or retire for deliberation. If they retire, they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court, subject to the discretion of the court to permit them to separate temporarily at night, and at their meals. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon a verdict, unless by order of the court," etc.

Section 297 provides that a new trial will be granted for:

"1. Irregularity in the proceedings of the court, jury, referee or prevailing party, etc., by which the party was prevented from having a fair trial.

"2. Misconduct of the jury or prevailing party."

1. Section 268 of the Code, whether considered mandatory or

directory merely, clearly requires that jurors remain together during the term of their deliberation, except when permitted to separate by order of the court. Yet every departure from this letter will not be treated as an irregularity or misconduct on the part of the jury, such as to require the verdict to be set aside. When, from the irregularity or misconduct of the jury, there is reason to believe a fair trial has been prevented, or that the verdict is the result of bad motive, it should be set aside.

Many of the old rules, regulating the conduct of the jury after retiring to the jury-room to consider of their verdict, have been abrogated. They are now to be treated as reasonable men, and their conduct will be considered and judged in the light of the circumstances under which they acted, as well as the motives that influenced the conduct to be considered. The separation of this jury was an irregularity, and technically, might be called misconduct. But what were the circumstances inducing the separation?

While deliberating, an alarm of fire is heard in the jury-room. The fire is blazing in a large block of buildings near the jury-room. The court, officers, attorneys, witnesses, all, in demoralized eagerness, are hastening from the court-house. The jurors see and hear all this, and partaking of the general feeling of excitement, and, perhaps, curiosity, are let out of their jury-room — not to do an unlawful act — not with the purpose to violate their oath or smirch their verdict. The act of separation was technically a violation of the statute, but involved no moral wrong, and, in our opinion, could not in any degree tend to prevent a fair trial or an honest verdict. *Downer v. Baxter*, 30 Vt. 467; *Parsons v. Huff*, 38 Me. 137; Hilliard on New Trials, ch. 10, § 52, and cases cited; 1 G. & W. on New Trials, 84, 85.

[Omitting the other questions indicated.]

We find no substantial error in the judgment of the Court of Common Pleas in refusing to award a new trial.

It follows that the judgment of the District Court must be reversed; and this court now proceeding to render the judgment the District Court should have rendered, affirms the judgment of the Court of Common Pleas.

Judgment accordingly.

Schaeffler v. City of Sandusky.

SCHAEFFLER V. CITY OF SANDUSKY.

(33 Ohio St. 248.)

Municipal corporation — negligence — contributory — icy sidewalk.

A person who voluntarily attempts to pass over a sidewalk of a city, which he knows to be dangerous by reason of ice upon it, which he might easily avoid, cannot be regarded as exercising ordinary prudence, and cannot maintain an action against the city to recover for injuries sustained by falling upon the ice.*

ACTION to recover damages for an injury by a fall occasioned by snow and ice on a sidewalk of the defendant.

The jury returned a general verdict in favor of the plaintiff, and a special verdict in response to interrogatories submitted to the jury by the court, as follows:

1. "Was the sidewalk, at the time the injury happened, aside from the accumulation of snow and ice, in good condition and repair?"

A. "Yes."

2. "Was the obstruction complained of an unnatural and artificial accumulation of snow and ice, or a natural and ordinary one?" A. "A natural one."

3. "Did the plaintiff see and know the nature and character of this obstruction before and at the time of passing over it? And did he, knowing this, voluntarily pass over it?" A. "He did."

4. "Could he have easily avoided it, either on the same walk, in the street, or on the opposite side, or on any other walk, and reach his destination? If so, how, and in what way?" A. "He could have avoided it."

On the special findings the court gave judgment for defendant below.

H. & L. H. Goodwin, for plaintiffs in error, cited *Shear. & Red. on Neg.*, §§ 395, 414; *City of Providence v. Clapp*, 17 How. 161; *Loker v. Brookline*, 13 Pick. 346, 347; *West v. Village of Brockport*, 16 N. Y. 163-5, note; *Chicago City v. Robbins*, 2 Black, 418; *Chase v. Cabot Bridge Co.*, 6 Allen, 512; *Wallace v. Mayor, etc.*, 2 Hill. 440; *Reed v. Northfield*, 13 Pick. 94-8; *Smith v. Lowell*, 6 Allen, 39; *Snow v. Housatonic R. Co.*, 8 id. 441, 450, and 137; *Frost v. Wal-*

* See *Dooley v. City of Meriden* (44 Conn. 117), 36 Am. Rep. 422.

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tham, 12 id. 85, 86; *Whittaker v. West Boylston*, 97 Mass. 273; *Fox v. Sackett*, 10 Allen, 535; *Filer v. N. Y. Cent. R. R. Co.*, 49 N. Y. 47; *S. C.*, 10 Am. Rep. 327; *Barton v. St. Louis R. R. Co.*, 52 Mo. 253; *S. C.*, 14 Am. Rep. 418; Wharton on Negligence, § 403, and authorities cited; *Thurber v. Hudson River R. R. Co.*, 60 N. Y. 331, 332.

E. B. & C. W. Sadler, for defendant in error.

DAY, J. The liability of the city for the unsafe condition of the streets, especially when it arises from natural causes, is contested; but the view we take of the case renders it unnecessary to determine that question; for if it exists, and the negligence of the city be conceded, the plaintiff was not entitled to recover, if his injury resulted from the want of ordinary care on his part. His negligence is claimed to be established by the special verdict; and we think the question made on this point is decisive of the case.

In rendering a general verdict in favor of the plaintiff, the jury necessarily found that he was without fault. Was this finding consistent with the facts specially found by them?

The plaintiff charged that the defendant suffered snow and ice to accumulate and remain on the sidewalk, in such manner that the sidewalk "became unsafe and dangerous." The unsafe and dangerous character of the obstruction was the *gravamen* of the complaint; for if it did not render the sidewalk unsafe, there was no such negligence of the city as would afford a ground of complaint. It must be assumed, then, to entitle the plaintiff to recover, that the obstruction was of an unsafe and dangerous character; and the jury must have so found, or they could not have found against the defendant.

In regard to this unsafe and dangerous obstruction, the jury by their special verdict found, that as matter of fact, the plaintiff knew its nature and character before he attempted to pass over it; and that having such knowledge, he voluntarily passed over it, when he could have avoided it, and reached his destination without going over it. Indeed, it is fairly inferable from the special findings that he could have "easily" avoided the obstruction. Under such circumstances it was his duty to avoid the danger.

If the snow and ice presented a dangerous obstruction, which the defendant was bound to remove, so that it was negligence to leave it on the sidewalk, it must follow, since its "nature and character"

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were known to the plaintiff, that it was imprudence in him to venture upon it, or that if it was prudent for him to pass over it, he did not exercise due care.

The case, as found by the special verdict, is not one where there is an obstruction not known to be perilous. In that class of cases negligence cannot be imputed to one who uses such carefulness as a man of ordinary prudence would exercise. But where there is danger, and the peril is known, whoever encounters it, voluntarily and unnecessarily, cannot be regarded as exercising ordinary prudence, and therefore does so at his own risk. *Durkin v. City of Troy*, 61 Barb. 437; *Evans v. City of Utica*, 69 N. Y. 166, S. C., 25 Am. Rep. 165; *Wilson v. City of Charlestown*, 8 Allen, 137; *Belton v. Baxter*, 54 N. Y. 245; S. C., 13 Am. Rep. 578; *Pennsylvania Co. v. Rathgeb*, 32 Ohio St. 66. This was the case of the plaintiff, as shown by the special verdict. He was then not without fault on his part. But the general verdict necessarily exculpates him from negligence. The special and general verdicts are therefore inconsistent. In such cases, "the former controls the latter, and the court may give judgment accordingly." Code, § 277.

It follows that the court did not err in refusing to render judgment on the general verdict, nor in rendering judgment on the special verdict in favor of defendant.

Judgment affirmed.

GOODALL V. CROFTON.

(33 Ohio St. 371.)

Nuisance—adjoining machinery—injunction.

An injunction will not issue to restrain one from operating machinery in a lawful business, on the ground that it shakes and cracks the walls of the plaintiff's adjoining houses, and diminishes their rental value, it appearing that an adequate remedy existed in an action for damages, and that the plaintiff did not object to the erection of the machinery but submitted to its use for seven years.*

PROCEEDING to enjoin a nuisance. The parties were owners of adjoining lots in Cincinnati, the plaintiff's lots being occupied

* Compare *Minks v. Hofeman* (87 Ill. 450), 29 Am. Rep. 68; *Green v. Lake* (84 Miss. 540), 28 Am. Rep. 378, and references.

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by houses which he rented, and the defendant using his lots as a stone yard. In the defendant's business he used steam machinery for sawing and dressing stone, which the plaintiff alleged caused a great noise, and caused the walls of his houses to crack and shake, and his tenants to leave, and diminished the rental value of his property. The plaintiff's houses were erected in 1862; the defendant owned his lots and used them as a stone yard before that time, but introduced the machinery in question in 1863. The court made the following decree:

"The court therefore adjudges and decrees, that defendant be perpetually enjoined from conducting said business, and he is hereby prohibited from permitting said business to be conducted so as to cause or occasion any perceptible trembling, oscillation, or vibration of the plaintiff's said buildings, or so as to disturb the enjoyment of the occupants of said buildings."

Forest, Cramer & Mayer, for plaintiff in error.

Fox & Bird, for defendant in error. It is well settled, that where any business is carried on by power of steam, and in carrying on the business the owners of adjoining property are injured in their buildings, whether by cracking the walls, by rendering the buildings untenable or less convenient, by reducing their renting value or otherwise, the carrying on such business is a nuisance. *McKeon v. See*, 4 Robt, 449; affirmed in 51 N. Y. 300; 10 Am. Rep. 659. If the injury is a continual one the remedy is by injunction. 51 N. Y. 307. The same principle is recognized and established in *Peck v. Elder*, 3 Sandf. 126-281; *Fish v. Dodge*, 4 Den. 311; *Catlin v. Valentine*, 9 Pai. 575; 4 E. S. C. L. and Equity, 15; *Duncan v. Hayes*, 22 N. J. Eq. 25; *Cleveland v. Citizens' Sash Co.*, 20 id. 201; *Campbell v. Seaman*, 2 T. & C. 233; *S. C.* (63 N. Y. 568), 20 Am. Rep. 567; 113 E. C. L. 65, 80, overruling *Hale v. Barlow*, 93 E. C. L.

ASHBURN, J. It would be almost impossible to enumerate the cases in which courts of equity, in this and other countries, have interfered or refused to interfere in cases of alleged nuisance, public and private. It will suffice to say, the result of all these cases seems to be, that when the right is clearly made out, and the nuisance established, a court of equity, in case of private nuisance, will interfere to prevent that which violates the rights of another in his property in an essential degree.

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In this State, however, we understand the rule to be, that a court of equity will only interfere to restrain an alleged nuisance, when the mischief to the plaintiff's property, or rights in his property, are irreparable, and there is no adequate remedy at law to make reparation. Although the restraint of an established nuisance "is an admitted ground of equity jurisdiction," that branch of the law "will carefully abstain from interference where the injury will support an action at law, unless the party seeking such aid brings himself within the clearest principles of equitable relief." *McCord v. Iker*, 12 Ohio, 388. To the end that right may be done and injury prevented, courts having jurisdiction in equity will determine each case, as it arises, upon its own facts and circumstances. When, from the nature of the case, and the right claimed to be infringed, no adequate remedy can be had in the courts of law, equity will entertain the action, where the thing sought to be prohibited is not a nuisance *per se*, but may, under some circumstances, prove so, the court will not interfere without a previous trial at law. 1 Grant's Cases, 412; 19 Eng. L. & E. 639.

We think the plaintiff below, upon the showing made in his petition, and by his proofs, has an adequate remedy at law. There is no complaint that the alleged nuisance, in any degree, interferes with his health or that of his family; that it works a personal inconvenience or discomfort. He complains, in his petition, that by reason of the offensive noise, together with the vibration and shaking of his buildings by the alleged nuisance, his rents were reduced; that the steam power, with the gearing and machinery attached, by jarring and shaking his buildings, has caused the walls thereof to crack; that the vibration and jarring of the eastern building alarmed the tenants and caused them to leave, so that that building cannot be rented for the same sum of money as the adjoining buildings, though of the same size and finish.

Plaintiff's right to invoke the interference of equity is not clear on the face of his petition. Injury to his building, of the nature alleged, and loss of rents, could be compensated in damages by a jury. He alleges no injury arising from the offensive noises made by the defendant's machinery, save as it affects the rental value of his property. Where an assessment of damages will compensate for the loss suffered from a nuisance, equity will not interfere; and as a general rule, that mischief or damage which is susceptible of compensation in damages is not irreparable.

We have carefully considered the evidence in the case, and when applied to the pleadings and issues we have no doubt but that the injury, sustained by the plaintiffs, by reason of the alleged nuisance, could be compensated in an action for damages. Where a party has a plain and adequate remedy at law, and his right, as in this case, does not appear perfectly clear for equitable jurisdiction, the party will be required to first establish his right at law. *Richard's Appeal*, 57 Penn. St. 105.

There is another ground upon which the party should be required to establish his right at law before resorting to equity. Plaintiff admits the business carried on by defendant, of which he complains is not a nuisance *per se*. Plaintiff stood by and saw defendant erect his business-house, place his steam power and other machinery therein, knowing the use to which it was to be applied, and for seven or more years, without objection, saw the business carried on during the same hours and to the same degree. This delay and apparent acquiescence will not, perhaps, jeopardize his legal rights, but are circumstances justifying the chancellor in sending plaintiff to a court of law, to establish his right and seek compensation, before equity will interfere by injunction. *Weller v. Smeaton*, Cox's Cases in Eq. 102; *Reid v. Gifford*, 6 Johns. Ch. 19.

A court of chancery may interfere, by injunction, when the injury is conceded, or is clearly established, yet the power should always be exercised cautiously and be sparingly used. Where the business complained of is lawful, and conducted in the most approved and orderly manner, in a place where there are in operation numerous establishments of kindred description, contributing to the needs of the community, and where the destruction of a business would occasion more injury to the defendant than advantage to the plaintiff, the chancellor will exercise the high prerogative of injunction with great care and caution.

In this case the decree of the court is distinctively severe on defendant. In the light of the testimony it amounts to prohibition. It orders that defendant "is hereby prohibited from permitting said business to be conducted so as to cause or occasion any perceptible trembling, oscillation or vibration of the plaintiff's said buildings." This is to be done in sixty days. If the testimony can be credited, this decree would operate to the total destruction of defendant's business, working apparently a far greater injury to him than advantage to plaintiff. This, too, when plaintiff, for the alleged injury

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has an ample remedy at law. The principle, if such exists, that will support this decree to the full extent would cause every heavy laden wagon passing over Genesee street to do so at the peril of an injunction. The case of *Gilbert v. Showerman*, 23 Mich. 448, is in principle similar to this. Applying substantially a remark of COOLEY, J., in that case to this, we cannot shut our eyes to the obvious truth that if the running of defendant's engine and machinery, in the manner it appears to have been carried on, can be enjoined, almost any manufactory in any of our towns and cities may be enjoined upon similar reasons.

We think the testimony admitted, over the objection of defendant below, was incompetent. As a question of law, its importance does not require further consideration.

Judgment reversed.

SECOND NATIONAL BANK OF CLEVELAND v. MCGUIRE.

(33 Ohio St. 295.)

Negotiable instruments — waiver of protest — general assignment by maker to indorser.

M. was indorser upon a series of notes made by C., who had assigned all his property, for the benefit of all his creditors equally, to M. After the assignment, M. told the bank, holder of the notes, to bring them to him as they matured, and he would pay them, or waive protest on them. This was done upon all the notes but the last. At noon of the day the last became due, the bank clerk presented it to M. for payment, who said he would not pay it or waive protest on it, because the signature was not his, but a forgery. *Held*, the necessity of demand and notice was not dispensed with.

ACTION on a promissory note, against maker and indorser. At the time the plaintiff discounted this note it held several other notes made by the defendant, Carr, and indorsed by the defendant, McGuire. Subsequent to the discounting of the note in suit, and before its maturity, and before the maturity of the other notes, the defendant, Carr, made a general assignment, for the benefit of his creditors, to the defendant, McGuire. Subsequent to the assignment, and while the plaintiff was the holder of said note, the defendant, McGuire, told a clerk of the plaintiff that Carr had assigned to him, and that the bank

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need not present the notes for payment, but to bring to him all the notes, as they became due, and he would either pay or waive protest on them. The clerk did present to McGuire all the notes, as they severally matured, and McGuire either paid them or waived in writing demand of payment, and notice of non-payment, of all of them, except the one in suit, which matured later than the others. About noon on the day of the maturity of the note in suit he presented this note to McGuire for payment, and McGuire answered that he would not pay the note, nor waive protest on it, because the signature on its back was not his, but was a forgery. No demand was made upon the maker, Carr. Carr's assets were insufficient to pay his liabilities. The plaintiff had judgment at the trial, which was reversed by the District Court.

W. J. Boardman, for plaintiff in error. There was no necessity for demand and notice. *Brett v. Levett*, 13 East, 213; 1 Pars. on Notes and Bills (ed. 1867), 562, 566, 567, 569; *Mechanics' Bk. v. Grisnold*, 7 Wend. 166; *Bond v. Farnham*, 5 Mass. 170; *Barton v. Baker*, 1 S. & R. 334; *Watkins v. Crouch*, 5 Leigh. 538.

Tyler & Denison and *Hamilton & Denison*, for defendant in error

WRIGHT, J. It is not necessary to consider the question of forgery in this case, as the jury did not seem to give it much consideration, and perhaps with good ground for so doing.

But it is claimed by McGuire's counsel that the Superior Court erred in its charge to the jury, and therefore the District Court were right in reversing the judgment, and the District Court should be affirmed here.

The part of the charge complained of is this: "If upon this evidence, however, you do not find that McGuire either waived demand and notice, or did not, by his conduct, mislead the plaintiff, and so prevent a demand upon the maker and notice to himself, I say to you (and because requested by the plaintiff, and so I understand the law to be), that if before the maturity of this note, McGuire, the defendant, as assignee in insolvency, had received a transfer from Carr, the maker, of all his, Carr's, property, and that on the day of the maturity of the note, the plaintiff made a demand on him, McGuire, for the payment of the note, that would be in law a sufficient demand and notice to charge him, as indorser."

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The counsel for the bank seem to claim that this assignment of all Carr's property to his indorser, McGuire, instead of making the demand on the latter a sufficient demand, was rather an excuse for not making any demand at all. They say, "McGuire, having obtained an assignment to himself of all the maker's property, the holder was thereby released from making demand upon the maker of the note, for the reason that such a demand would have been useless, and also for the reason that McGuire knew that a demand would be useless."

It has been often said that an assignment of all the maker's property to an indorser, dispensed with demand and notice, but exactly what the rule is, is a matter of some doubt, as will be seen by reference to the learned notes, in Redfield & Bigelow's *Leading Cases on Bills and Notes*, and see *Barton v. Baker*, 1 S. & R. 334 ; 1 Pars. Notes and Bills, 560-575, and the notes thereto. In this case we deem it enough to say, that unless the assignment was sufficient to protect the indorser, demand and notice is not dispensed with. The ground of this rule is, that as the indorser is secured by the property in his hands, there is no occasion for demand and notice. Kent states that the fact that the indorser is "protected," occasions the waiver of his legal rights. 3 Kent, 113. The evidence shows that Carr's assets were not sufficient to meet his liabilities, and the charge thereupon was erroneous. The assignment did not make the demand on McGuire a sufficient demand, nor did it dispense with the necessity of demand. It has already been held by this court in *Beard v. Westerman*, 32 Ohio St. 29; that "demand and notice are not necessary as against an indorser, who, at the date of the maturity of the note, has sufficient property of the maker in his possession held as security against his liability."

But, on behalf of the bank, it is claimed, that conceding this charge to be error, yet the verdict upon the whole was right, inasmuch as McGuire had waived demand and notice, or rather that he had led the bank to suppose he had dispensed with them.

The evidence on this point we understand to be this: There were several of these notes, and McGuire had told the bank they need not present them to Carr, but they should bring them to him as they became due, and he would either pay them or waive protest. This he did until the day of payment of the note in controversy. At noon of that day the clerk came to McGuire with his note, and McGuire said "he would not pay the note nor waive protest upon it, because the signature on its back was not his, the said McGuire's, signature,

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but was a forgery." This is the clerk's statement. McGuire's, which is in effect the same, is: He says the clerk asked him "to pay or to waive protest on said note, which he (McGuire) then and there refused to do, and so expressly told Proudfoot, because said indorsement on the back of the note was a forgery, and he would never pay the note."

We understand the upshot of this conversation to be that McGuire intended to take back all he had said and done in the matter of waiving protest, and intended the bank so to understand. Under this agreement he had been pursuing a certain line of conduct, waiving protest (which includes demand, notice and all steps necessary to charge the indorser) upon the notes as they came along, but now there is one which is forged, or he thinks it is forged, or says it is forged. Thereupon he repudiates on the spot all existing arrangements, waivers and understandings, and tells the bank to pursue its legal remedies, whatever they are. This is the way the evidence strikes a majority of the court.

It is said, with a great deal of force, that McGuire stood in two characters, that of assignee and that of indorser; and that in his character of assignee, he did not intend to insist on demand, knowing it to be useless. But we think he did not intend to waive anything, or dispense with anything, either as assignee or indorser.

If the demand had been made at the close of bank hours, *non constat* but that the note might have been paid. Perhaps the supposition is far fetched. We concede it to be so. But the indorser had the right to have that done which would exclude the possibility of any supposition, reasonable or unreasonable. He had to the last minute of the last hour of the last day, and if no one by that time stepped in to meet the demand of payment, he was liable. But how does a demand three or four hours before this time show that no payment could or would be made at this time? This may be said to be technical. So is the law with regard to demand and notice. It must be complied with, and it is no excuse to show that there was no use in complying with it.

The law on this subject is strict and well defined, and a waiver of the steps to charge the indorser must be clear and beyond dispute. The bank had plenty of time to take these steps after the indorser had retracted his previous agreement, and to fasten a waiver on him now, it must be upon acts or words that are not doubtful. Parsons well says (1 Bills & Notes, 465): "We are unwilling to close this

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topic of excuse for non-presentment without remarking that the rule requiring presentment is so stringent, and rests upon reasons which require so rigid an adherence to the rule, that it is not safe or prudent to rely upon any of these excuses, except perhaps an express waiver in writing upon the paper itself."

Judgment of the District Court is affirmed.

PITTSBURGH, CINCINNATI AND ST. LOUIS RAILWAY COMPANY v.
MOORE.

(33 Ohio St. 384.)

Statute — construction — forfeiture or penalty.

A statute which prohibits any railroad corporation from demanding and receiving for the transportation of passengers more than three cents per mile, for a distance of more than eight miles, gives the party aggrieved a right to recover from such corporation a forfeiture of not less than twenty-five dollars for each case of overcharge.*

ACTION to recover the forfeitures provided by a statute which reads as follows: "Any corporation operating a railroad in whole or in part in this State may demand and receive for the transportation of passengers on said road, not exceeding three cents per mile for a distance of more than eight miles; * * * and every such corporation * * * who shall violate, or permit to be violated, the provisions of this act, or any other corporation, company, person or persons who shall demand or receive a greater sum of money for the transportation of passengers * * * on or over their railroad than the sum allowed by law, shall forfeit and pay to the party aggrieved a sum equal to double the amount of the overcharge, but in no case shall the amount of the forfeiture be less than twenty-five dollars."

Nineteen distinct violations of this statute were charged, in each of which the distance traveled over the road of defendant below is stated, and also the fare demanded and received by said defendant for such travel, which in each case exceeds the rate of three cents per mile. In no one of the cases alleged, however, did such excess amount to twelve dollars and a-half, nor did the aggregate of such

* See note, 37 Am. Rep. 722.

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excess, in all the cases, amount to that sum. Plaintiff below demanded and had a judgment for twenty-five dollars for each of the alleged violations of the statute.

J. R. Swan, for plaintiff in error. The penalty against railroad companies under the act of April, 1873, for charging more for transportation than the law allows, is double the overcharges and not the twenty-five dollars mentioned in the proviso. When, therefore, an action is brought to recover double the overcharges at different times, we claim, if the aggregate amount of the overcharges when doubled is less than twenty-five dollars, the plaintiff is entitled to a judgment for twenty-five dollars to cover such double overcharges and to cover the expenses of prosecuting the action; and on the other hand, if the overcharges doubled amount to more than twenty-five dollars the plaintiff is entitled, under the section, to a judgment for double the overcharges. As a penal statute will be construed strictly, and penalties not be implied or multiplied beyond its express terms, we refer the court to the peculiar language of the statute. It will be observed that it does not provide that the twenty-five dollars shall be recovered for each and every overcharge where double the amount of each overcharge is less than twenty-five dollars. It would have so provided if it had adopted the usual and customary language of penal statutes, had such been the intention. To find that intention the court must, after the word "forfeiture" in the proviso, interpolate the words "for each and every overcharge." So, too, if double the overcharges sued for amounts to twenty-five dollars or over, it is clear the plaintiff can recover no more than double the overcharges, and in such case the twenty-five dollars mentioned in the proviso has nothing to do with the amount of the recovery or forfeiture. *Fisher v. N. Y. C. R. R.*, 46 N. Y. 644. We claim in this case that the overcharges when aggregated and doubled being less than twenty-five dollars, the plaintiff below could claim a verdict and judgment for twenty-five dollars only, and that he should have prosecuted this action before a justice of the peace.

J. B. Cole, for defendant in error.

Scorr, J. (Omitting a question of pleading.)

The only remaining question is, whether the court below erred in rendering judgment for a forfeiture of twenty-five dollars in each case of overcharge.

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We do not understand that the plaintiff in error denies that the several paragraphs in plaintiff's petition each state a distinct cause of action. Plaintiff in error demurred to eight of them as distinct causes of action, and we think this was properly done. Nor did plaintiff in error, by demurrer or otherwise, question the right of plaintiff below to unite in one petition several distinct causes of action arising under the same statute. But the claim, as we understand it from the answer below, and from the argument of counsel for plaintiff in error, is that the statute gives to the party aggrieved a right to recover double the amount of the overcharges by way of penalty or forfeiture, and that the sum of twenty-five dollars is awarded only as a *conditional compensation* in cases where the aggregate amount of double the overcharges complained of in any action shall be found to be less than twenty-five dollars, and cannot, therefore, be recovered for each overcharge, inasmuch as the statute does not, in terms, provide that such sum shall be recovered *for each and every* overcharge.

In support of this position, we are referred to the case of *Fisher v. N. Y. C. R. R. Co.* decided by the Court of Appeals of New York, and reported in 46 New York, 644. There the plaintiff sued for numerous overcharges, as in this case, and claimed to recover the penalty of fifty dollars on *each* overcharge, together with the amount of the overcharges. The law of New York provided "that any railroad company which shall ask and receive a greater rate of fare than that allowed by law, shall forfeit fifty dollars, which sum may be recovered, together with the excess so received, by the party paying the same." The court held that "the forfeiture of fifty dollars was not given as a satisfaction of the injury received — that is fully satisfied by a return of the sum extorted, with interest; but the fifty dollars is given to compensate the party injured for his expenses in the prosecution, and to compel the company to pay such a sum as would stop the practice."

This New York statute, it will be perceived, gave the party aggrieved a right to recover two sums of money, to wit, fifty dollars, as a forfeiture, *together with* the excess received by the railroad company. The court held that the recovery of such excess was not intended by the statute as a satisfaction for the injury sustained, and that the penalty of fifty dollars was given to the party injured by way of compensation for expenses of prosecution, and to compel the company to desist from extortion. But the Ohio statute, under

which this action was brought, allows a recovery of but one sum, and that by way of penalty or forfeiture for each case of its violation. It gives nothing but a forfeiture "equal to double the amount of the overcharge, but in no case less than twenty-five dollars." The *cases* referred to in the clause which provides that "in no *case* shall the amount of the forfeiture be less than twenty-five dollars," clearly appear, from the preceding context, to be cases of overcharges. The New York statute, to which reference has been made, contained no such clause. And a majority of the court are unable to perceive a substantial difference between the meaning of this language, and that of a provision declaring that *in each and every case* of overcharge the forfeiture should be not less than twenty-five dollars.

If the amount of the forfeiture can, *in no case*, be less than twenty-five dollars, then it must, in each and every case, be as great as twenty-five dollars.

We think the judgment of the Court of Common Pleas must be affirmed.

WORKMAN V. WRIGHT.

(33 Ohio St. 405.)

Negotiable instruments — forgery — ratification.

A mere promise to pay a forged note, when such promise is given by the supposed maker of the note without any new consideration, and after the promisee has acquired the note, is not binding. (*See note, p. 549.*)

ACTION on a promissory note. The opinion sufficiently indicates the facts. The defendant had judgment below.

Harrison, Olds & Marsh, for plaintiff in error, cited as to ratification, Story on Agency (Bennett's ed.), §§ 253, 242, 250; *Bank v. Warren*, 15 N. Y. 577; *Crout v. De Wolf*, 1 R. I. 393; *Harper v. Devene*, 10 La. Ann. 724; Thomson on Bills, 218; *Bank v. Crafts*, 4 Allen, 447; *Forsythe v. Day*, 46 Me. 176; *Bank v. Middlebrook*, 33 Conn. 95; *Howard v. Duncan*, 3 Lans. 174; *Livingston v. Wiler*, 33 Ill. 387; *Hollis v. Pond*, 7 Humph. 223.

Butler & Huffman, for defendants in error.

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WRIGHT, J. Under the pleadings and finding of the court below, it may be assumed that the name of Calvin Wright was a forgery, as there was evidence tending to show the fact, and we cannot say that the conclusion reached, in this respect, was clearly against the testimony. It is claimed, however, that his admissions and promises to pay the note ratified the unauthorized signature.

Had Workman, the owner of the note, taken it upon the faith of these admissions, or had he at all changed his status by reason thereof, such facts would create an estoppel, which would preclude Wright now from his defense. This appears from most of the authorities cited in the case. But no foundation for an estoppel exists. All these statements of Wright, whatever they were, were made after Workman became the owner of the paper. Workman did not act upon them at all. He was in no way prejudiced by them, nor did they induce him to do, or omit to do, anything whatever to his disadvantage. But it is maintained that without regard to the principle of estoppel, these admissions and promises are a ratification of the previously unauthorized act, upon the well known maxim, *omnis ratihabitio retrotrahitur et mandato priori æquiparatur*.

It is said that a distinction exists between the classes of cases to which this principle applies. Where the original act was one merely voidable in its nature, the principal may ratify the act of his agent, although it was unauthorized. But where that act was void, as in case of a forgery, it is said no ratification can be made, independent of the principle of estoppel, to which we have alluded. Most of the authorities, cited by counsel for plaintiff in error, are of the first class, where the act was only voidable.

Bank v. Warren, 15 N. Y. 577, was where one partner, without authority, and for his own exclusive benefit, indorsed his own note in the firm name, his copartner was held bound by a subsequent promise to pay it, without any independent consideration.

In *Croat v. De Wolf*, 1 R. I. 393 the third clause of the head-note is: "Where the person, whose signature is forged, promises the forger to pay the note, this amounts to ratification of the signature, and binds him." But an examination of the case shows that evidence was offered to prove that plaintiff had bought the paper in consequence of what defendant said to him, and the court charged, that if before purchasing the note, plaintiff asked defendant if he should buy, and was told he might, defendant could not excuse himself on the ground of forgery. So that the case may be put upon

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the ground of estoppel, without relying upon the ground stated in the head-note quoted.

Harper v. Devane, 10 La. Ann. 724, was where a clerk of a house signed the name of the house by himself as agent. Defendant, a member of the house, afterward took the note, corrected its date, and promised to pay it; and this was held a ratification to make him liable. In this case, and many like it, it may be remarked that the agent assumed to have authority, and does the act under that belief; but in case of a forgery, there is no such authority and no such belief.

The case of *Forsythe v. Day*, 46 Me. 177, involves the principle of estoppel.

The cases of *Bank v. Crafts*, 4 Allen, 447, and *Howard v. Duncan*, 3 Lans. 175, sustain the views of plaintiff in error, holding that a forgery may be ratified, independently of the principle of estoppel, and in the absence of any new consideration for the ratifying promise — a conclusion, however, to which we cannot agree.

The case in 3 Lansing, is criticised in 3 Albany Law Journal, 331.

Upon the other hand, there are authorities holding that a forgery cannot be ratified. There is a fully considered case in the English Exchequer. *Brook v. Hook*, 3 Albany Law Jour. 255; 24 Law Times, 34. This was a case where defendant's name was forged, and he had given a written memorandum, that he would be responsible for the bill. Chief Baron KELLY places his opinion upon the grounds: 1. That defendant's agreement, to treat the note as his own, was in consideration that plaintiff would not prosecute the forger; and 2, that there was no ratification, as to the act done — the signature to the note was illegal and void. And though a voidable act may be ratified, it is otherwise when the act is originally, and in its inception, void. The opinion fully recognizes the proposition, that where acts or admissions alter the condition of the holder of the paper, the party is estopped, but it is necessary that such a case should be made. It is further held, that cases of ratification are those where the act was pretended to have been done for, or under the authority of, the party sought to be charged, which cannot be in case of a forgery. A distinction is also made between civil acts, which may be made good by subsequent recognition, and a criminal offense, which is not capable of ratification. Baron MARTIN did not concur. In *Woodruff v. Munroe*, 33 Md. 147, this is held: "If, in an action against an indorser of a promissory note by the *bona fide* holders thereof, it be

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shown that the indorsement was not genuine, and the defendant did not ratify or sanction it prior to the maturity of the note and its transfer to plaintiff, he is not liable. But if he adopted the note prior to its maturity, and by such adoption assisted in its negotiation, he would be estopped from setting up the forgery in a suit by a *bona fide* holder. But any admissions by the defendant, made subsequently to the maturity of the note, would not be evidence that he had authorized the indorsement of his name thereon." See, also, *Williams v. Bayley* (L. R.), 1 App. H. L. 200.

In *McHugh v. County of Schuylkill*, 67 Penn. St. 391; *S. C.*, 5 Am. Rep. 445, the defense to a bond was forgery. The court below charged that if the obligor subsequently approved and acquiesced in the forgery or ratified it, the bond was binding on him. It was held that there being no new consideration, the instruction was error; also, that a contract infected with fraud was void, not merely voidable, and confirmation without a new consideration was *nudum pactum*. See, also, *Negley v. Lindsay*, 67 Penn. St. 427; *S. C.*, 5 Am. Rep. 427. Daniels recognizes this proposition. 2 Dan. Neg. Inst., § 1352.

Upon principle we cannot see how a mere promise to pay a forged note can lay the foundation for liability of the maker so promising, when the promise was made under the circumstances set forth in the record. In addition to the fact that there are no circumstances to create an estoppel, there was no consideration for the promise. Wright received nothing, and it is a simple *nudum pactum*. The consideration for a promise may be either an advantage to the promisor or a detriment to the promisee, but here neither exists. Wright had signed a note, and when the one in suit was shown him, said he would pay it, supposing it to be the one he had signed. He was an ignorant man who could not read writing, though he could sign his name, and when he saw the paper, seeing that the signature spelt his name, and being unable to read the body of the instrument, he said it was all right and he would pay it. But the promise was without that consideration which would make it a binding contract.

Judgment affirmed.

NOTE BY THE REPORTER.—In *Brook v. Hook*, cited in the principal case, the plaintiff had received the note from J. on the day of its date, and afterwards and before its maturity he had an interview with the defendant, and showed him the note. The defendant denied that the signature was his, and said it must be a forgery of J.'s; upon which the plaintiff said he should consult a lawyer with a view to proceeding criminally against J. The defendant said rather than that he would pay the money, and thereupon he signed the following paper: "Memoran-

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dum, that I hold myself responsible for a bill dated Nov. 7, 1869, for \$20., bearing my signature and J.'s, of Mr. Brooke — RICHARD HOOK."

The following judgments were delivered:

The judgment of KELLY, Ch. B., CHANNELL and PIGOTT, BB., by KELLY, Ch. B. (after stating the facts): Upon this evidence it has been contended, on behalf of the plaintiff, that this paper was a ratification of the making of the note by the defendant; and upon the principle *omnis ratihabitus retrotrahitur et mandato priori æquiparatur*, the jury were directed to find that the note was the note of the defendant, and that the plaintiff was entitled to the verdict. I am of opinion that this verdict cannot be sustained, and that the learned judge should have directed a verdict for the defendant, or at least have left a question to the jury as to the real meaning and effect of the memorandum and the conversation taken together. And this, first, upon the ground that this was no ratification at all, but an agreement upon the part of the defendant to treat the note as his own, and to become liable upon it, in consideration that the plaintiff would forbear to prosecute his son-in-law, Jones; and that this agreement is against public policy, and void, as founded upon an illegal consideration. And secondly, the paper in question is no ratification, inasmuch as the act done—that is, the signature to the note—is illegal and void; and that although a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception void. Many cases were cited to show that where one sued upon a bill or note has declared or admitted that the signature is his own, and has thereby altered the condition of the holder to whom the declaration or admission has been made, he is estopped from denying his signature upon an issue joined in an action upon the instrument. But here there was no such declaration and no such admission. On the contrary, the defendant distinctly declared and protested that his alleged signature was a forgery; and although in the paper signed by the defendant, he describes the bill as bearing his own signature and Jones'. I am of opinion that the true effect of the paper, taken together with the previous conversation is, that the defendant declares to the plaintiff: "If you will forbear to prosecute Jones for the forgery of my signature, I admit, and will be bound by the admission, that the signature is mine." This, therefore, was not a statement to the plaintiff that the signature was his, and which, being believed by the plaintiff, induced him to take the note, or in any way alter his condition; but on the contrary, it amounted to the corrupt and illegal contract before mentioned, and works no estoppel precluding the defendant from showing the truth, which was that the signature was a forgery, and that the note was not his own. In all the cases cited for the plaintiff, the act ratified was an act pretended to have been done for or under the authority of the party sought to be charged; and such would have been the case here, if Jones had pretended to have had the authority of the defendant to put his name to the note, and that he had signed the note for the defendant accordingly, and had thus induced the plaintiff to take it. In that case, although there had been no previous authority, it would have been competent to the defendant to ratify the act, and the maxim before mentioned would have applied. But here Jones had forged the name of the defendant to the note, and pretended that the signature was the defendant's signature; and there is no instance to be found in the books of such an act being held to have been ratified by a subsequent recognition or statement. Again, in the cases cited, the act done, though unauthorized at the time, was a civil act and capable of being made good by a subsequent recognition or declaration, but no authority is to be found that an act which is itself a criminal offense is capable of ratification. The decision at *nisi prius* of CROMPTON, J., referred to in argument, is inapplicable, it being uncertain whether the plaintiff in that case knew that the alleged signature of the defendant was forged, and there being no illegal contract in that case to forbear to prosecute. The same observation may be made upon the case from Ireland, cited upon the authority of BURTON, J. I am therefore of opinion that the rule must be made absolute for a new trial, and that upon this evidence the jury ought to have been directed to find a verdict for the defendant, or at all events (which is enough for the purposes of this rule), that if any question should have been left to the jury, it ought to have been whether the paper and the conversation taken together did not amount to the illegal agreement above mentioned. My brother CHANNELL and my brother PIGOTT concur in this judgment.

MARTIN, B. (after stating the facts as above), proceeded: The rule for a new trial in this case was obtained upon the following grounds: First, that the verdict was against the evidence, and secondly, for misdirection, viz.: that the judge misdirected the jury in telling them that the only question for them was whether the memorandum of the seventeenth December was signed

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by the defendant. The statement as to my direction is substantially correct, and if I was wrong in holding that the signing and making by the defendant of the memorandum of the seventeenth December entitled the plaintiff to the verdict upon the issue joined, the defendant is entitled to have the rule made absolute, and to have a new trial. In the argument I asked the learned counsel for the defendant what he deemed to be the proper direction to the jury, and he stated it ought to have been as follows: "That having regard to what took place, and the circumstances under which the memorandum was given, the jury ought to have been asked whether the defendant intended to ratify and confirm what had been done by Jones in forging his name, or whether he intended to guarantee the payment of the note." Now, I am of opinion that I could not lawfully have submitted this question to the jury. In the first place, I am of opinion that when the defendant signed a memorandum professing to be an entire and complete writing evidencing a transaction, the true construction of that document, and not his intention other than shown by the writing, is the true test; and further, that it is a matter of law for the judge to construe the document, and its construction was not a matter to be submitted to the jury.

A case was cited from an Irish report (*Wilkinson v. Stoney*, 1 Jebb. & Synes, 509), that under the circumstances in that case there was a question for the jury. I have no doubt that that case was rightly decided, but there the writing was a letter, and there were other facts bearing upon the transaction; but the present was the case of a single writing made for the purpose of evidencing a transaction, and I entertain no doubt that such a writing is to be construed by the judge and not by the jury. If it were not so, there would be no certainty in the law. And in the second place, I am of opinion that there was no evidence that the document was a guaranty, or intended to be a guaranty, but the evidence was merely that the defendant was responsible upon the note. I am therefore of opinion that I should have acted erroneously if I had submitted the above question to the jury, and I remain of opinion, that under the circumstances of this case, the only question for the jury was, whether the memorandum of the seventeenth December was the memorandum of the defendant, and that my ruling was right, that if it were, it was a ratification of the contract made in the name of the defendant, and binding upon him, upon the legal principle that "*omnia ratihabitio retrotrahitur et mandato equiparatur*." Co. Litt. 207 a. I apprehend that the circumstance of Jones being a party to the note is immaterial, and that the question is the same as if the note was several, and the defendant's name alone on it; and in my view of the case, the facts may be taken to be that upon the morning of the seventeenth December the defendant was not liable upon the note, because his signature was forged; that the plaintiff took and held the note, believing that the signature was a genuine one, and that the contract to pay was the contract of the defendant, and that the defendant, upon the statement that a lawyer would be consulted as to the criminal responsibility of Jones, signed the document of the seventeenth December. In my opinion, this was a ratification within the meaning of the above maxim, and rendered the defendant liable to pay the note. A ratification is the act of giving sanction and validity to something done by another.

Jones, purporting to utter an obligatory and binding security, had given to the plaintiff the note bearing the defendant's name, and the defendant, by the writing signed by him, declared that "he held himself responsible upon it—it bearing his signature;" and, if that was not giving sanction and validity to the act of Jones in delivering the note, so signed, to the plaintiff I am at a loss to know what a sanction or ratification is. To say it is not, seems to me a plain misconstruction of a written document—the denial of a self-evident proposition. Suppose nothing had been said as to criminal proceedings against Jones, and that the defendant, upon being shown the note by the plaintiff, had merely said "the writing is not mine, but I am responsible for it," can any one doubt that the maxim would have applied, and that the defendant would have ratified the transaction? It is so stated by BURTON, J., in the case of *Wilkinson v. Stoney* before cited, and he was one of the most eminent of modern lawyers. Then does the circumstance that the plaintiff said that he would consult a lawyer in regard to criminal proceedings against Jones make any difference? I think not. A ratification of a contract is not a contract; it is an adoption of a contract previously made in the name of the ratifying party. The contract, if a simple contract, must have been made upon valuable consideration; if it were not, the adoption or ratification of it would be of no avail. This is the true meaning of the sections cited by Mr. Lopez from Story on Agency (§§ 240–242). If a contract be void upon the ground of its being, of itself and in its own nature, illegal and void, no ratification of it by the party in whose name it was made by another will render it a valid contract; but if a contract be

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void upon the ground that the party who made it in the name of another had no authority to make it, this is the very thing which the ratification cures, and to which the maxim applies that "*omnis ratihabito retrotrahitur et mandato priori æquiparatur*." No words can be more expressive; the ratification is dragged back, as it were, and made equal or equipollent to a prior command. A ratification is not a contract, and requires no consideration. It was so said by BURTON, J., in the cases referred to. It may be and is that a contract, that in consideration that the holder of a promissory note would not prosecute a man for the felony of forging a name to the note, the defendant would pay the note, or guarantee the payment of it, would be illegal and void; but there was no evidence of such a contract, even in words, in the present case, and if there were, there would be a legal principle to prevent its operation, for the written memorandum was made and signed for the purpose of evidencing the transaction; and there is not a word of contract in it, either on behalf of the plaintiff, or indeed, of the defendant. It is what it was intended to be, a ratification or adoption by the defendant of the signature and contract made in his name, it may have been by a forger, or it may have been under circumstances which would not have justified a conviction for that offense; for the purpose of my judgment I assume it was a forgery, for which Jones might have been convicted. The case of *Wilson v. Tammam*, 6 M. & G. 236, was cited on both sides. It is a case of great authority, and is a considered judgment. It is there laid down that an act done for another by a person not assuming to act for himself, but for such other person, *though without any precedent authority whatever*, becomes the act of the principal, if subsequently ratified by him. In such case the principal is bound by the act, whether it be for his detriment or advantage, and whether it be founded on a tort or a contract, to the same extent, and with all the same consequences, which follow from the same act done by his previous authority. Several other cases were cited to the same effect, but there is no doubt about it. TINDAL, Ch. J., lays it down as the known and well-established rule of law, and as it seems to me, it is conclusive in favor of the plaintiff in the present case. But it was said that a forged signature cannot be ratified. No authority was cited for this, and I believe none can be found. In one sense, perhaps, a forgery cannot be ratified or condoned as regards the forger, but there is no authority whatever to distinguish the ratification of a parol contract and of a written one made by one person in the name of another without authority. TINDAL, Ch. J.'s expression is, "made without any precedent authority whatever," which would clearly include a forged document.

There is in Mr. Broom's *Treatise on Legal Maxims* (5th ed. 867), a comment upon the maxim, and also, in Justice STORY's book on *Agency* (beginning at § 239), and in neither of these treatises is one word to be found drawing any distinction between the ratification of a written contract, which was in its inception a forgery, and one which was not of that character. The foundation of ratification of contracts is throughout deemed to be that the contract originally purported to be by and in the name of the person ratifying. But there is authority to the contrary. In the before cited case of *Wilkinson v. Stony*, BURTON, J. clearly shows that he thought a forged acceptance of a bill could be ratified; and in *Ashild v. Bryan*, 8 B. & S. 492; 32 L. J. 91, Q. B.; 7 L. T. R. (N. S.) 706, the late CHOMPTON, J. stated that a cause had been tried before him where a father was sued upon his acceptance forged by his son. The party who held the bill went to the father and said: "We shall proceed against your son; is this your acceptance?" and the father said, "It is," and upon this evidence he thought the rule as to estoppel, in *Freeman v. Cooks*, 2 Ex. 654, applied, and that the father was liable. He says that a bill of exceptions was tendered to his ruling by a very learned person, but after consideration it was abandoned. He goes on to say that he was not sure whether the party had knowledge that it was not the acceptance of the father, but he says that in his opinion, that was immaterial, and that the person making the statement must be considered as saying: "The instrument may be treated as if accepted by me." This case seems to me to be identical with the present, and with me no higher authority exists than the judicial opinion of CHOMPTON, J. He put this case on the ground of estoppel. I think the doctrine of ratification the more applicable; but whether such a document as that of the seventeenth December operates by way of estoppel or by that of ratification, in my opinion it rendered the defendant liable. In my opinion, my rule at nisi prius was right, and the rule ought to be discharged.

In *Williams v. Bayley*, cited in the principal case, the element of compounding a felony entered. A father had agreed to execute a mortgage to take up certain notes on which his name had been forged by his son. This was done in compliance with the request of the holder, and

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his talk of "pressure," although without any threat of prosecution, and the notes were surrendered. The House of Lords held that he was not a free moral agent, and that the agreement could not be enforced.

Ferry v. Day, 46 Me. 176, was a case of agency, and not of forgery. The instruction given and sustained was, that if the defendant had given D. authority to make notes and put thereon the defendant's name, as a party thereto, and to put notes thus executed into general circulation, as bearing the defendant's signature, and had not at the date of the note in suit revoked such authority, and D., acting upon such authority, executed said note and passed it to the plaintiff as the note of the defendant, bearing his genuine signature, and it was received by the plaintiff as such, the defendant would be bound thereby. The authority to execute such notes, it was held, might be inferred from the fact that the defendant had previously acknowledged other similar notes. This therefore raised the element of estoppel, as stated in the principal case. But upon the point of the admission of the defendant of the genuineness of the signature after the plaintiff had acquired the note, the court in the principal opinion said: "If the plaintiff suffered no detriment from the induction of such belief, the excepting defendant would not be estopped from showing that he did not intend to make the note his." Therefore a new trial was granted because of an instruction that such admission would be *conclusive* proof of the adoption of the note. DAVIS, J., in a separate opinion, said that "the defendant was not estopped by such admission from denying the signature, unless the note was taken in consequence of it, or the holder was otherwise injured by being induced thereby to refrain from enforcing it against the other party when he might have secured it." This case is therefore an authority in favor of the principal case. In both opinions, *Hall v. Huse*, 10 Mass. 39, was cited, holding that notwithstanding the admission the defendant might prove the signature not to be his.

Casco Bank v. Keme, 53 Me. 103, is a case where, on account of the defendant's admission of the genuineness of the signature, the bank refrained from proceedings against the person from whom they received the note to secure payment. The instruction excepted to and sustained was, that "if the plaintiffs, relying upon the defendant's admission, were induced to refrain from obtaining security of Jordan, by his arrest or by an attachment of his property, and they thereby sustained an injury, then the defendant would be estopped from denying his signature." This therefore does not impugn the principal case.

Over v. Paul, 41 N. H. 24, to some extent, supports the principal case. The court said: "It seems to have been contended by the counsel for the plaintiff, that if the defendant, when he called at the bank and examined the note, and was requested to pay it, did not disavow it, he would be afterwards precluded by law from denying it; and on the other hand, the defendant's counsel contended that no legal consequence arose from the defendant's omission to denounce the note, unless the jury found that by such omission the bank had been prejudiced. Neither of these points are well taken." The court then allude to estoppel by silence or acquiescence, with knowledge that the note was being offered for discount, upon the acquirement of the note, saying, "by these tacit admissions he would be forever concluded to deny the note to be his in case the bank discounted it." And they conclude: "Upon the same principle, if the defendant here, knowing the true condition of the case, had by his silence prevented the bank from taking measures which they were proposing to adopt at once to secure themselves on the property of John H., from a doubt of the genuineness of the defendant's signature, he would be bound by his silence and estopped to deny his signature. But in such a case it would be a complete answer to a claim that a party was thus concluded, to show that the adverse party had not acted upon such an admission, and were not thus prejudiced by such silence; as for instance, if it could be shown that they were perfectly aware of the truth and were not misled. But neither of these principles were applicable in this case. There is no pretense of evidence that the bank were in any respect induced to change their position by anything that occurred when the defendant called at the bank; nor is there room for the suggestion that the bank were aware of the actual condition of the note until afterward."

Shisler v. Van Dyke, Pennsylvania Supreme Court, 1880, is a strong authority for the principal case. The court said, "The question, however, remains; could the forged endorsement, conceding it to be such, be ratified, and thus made good? This question must be answered in the negative, if we accept as authority the case of *McHugh v. Schuylkill County*, 7 P. F. S. 391; 2 C., 5 Am. Rep. 447. This case is in point; there, as here, the question was whether there could be an after-ratification of a forged obligation, and it was held that there could be no such

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ratification. It is true, the *dicta* of this case, going, as it does, beyond the point ruled, would indicate that no contract, vitiated by fraud of any kind, is the subject of subsequent ratification. But this cannot be sustained, as it is opposed to those decisions now regarded as law, notably, *Pearson v. Chapin*, 8 Wr. 9, and *Negley v. Lindsay*, 17 P. F. S. 217. The distinction between these cases seems to be this: where the fraud is of such a character as to involve a crime, the ratification of the act from which it springs is opposed to public policy, and hence cannot be permitted; but where the transaction is contrary only to good faith and fair dealing; where it affects the individual interests and nothing else, ratification is allowable. It is, indeed, conceded, in the cases last above cited, that if the original contract be illegal, or void for want of consideration, no subsequent ratification will help it. If, however, the indorsement under consideration was forged, it was not only void for want of authority, but it was also illegal, and so comes under the condemnation of all authority."

In *Union Bank v. Middlebrook*, 33 Conn. 95, the signature of one of two brothers had been forged upon a note made by the other but fraudulently altered by their sister's husband, which note had been discounted by the plaintiff. The avails of the note were laid out in buying goods in the name of one of the brothers, which the other brother, after notice of the fraud, but without informing the bank of them, bought in from him at a low price and sold at a greater. It was held that the jury might infer a ratification from this. But the court also held that the goods ought to be regarded as those of the bank, as the purchase-money had been obtained from it by fraud, and that the money into which they had been turned stood in place of the goods. In *Fitzpatrick v. School Commissioners*, 7 Humph. 224, it was held that a ratification might be inferred from the taking of security by the party whose name was forged.

Similar to the two last cases is *Livings v. Wiler*, 32 Ill. 387. The holder of a forged note and mortgage, rendered an itemized account to the alleged mortgagor, showing a credit for the proceeds of the mortgage and a balance in favor of the mortgagor, and the latter, with knowledge of the note, mortgage and credit, sued and recovered judgment on the account. This was held a ratification of the note and mortgage. "The defendant had received and appropriated the proceeds of the mortgage to her own use, just as much as if she had received the proceeds in gold, and placed it in her pocket."

In *Howard v. Duncan*, 3 Lans. 175, a note purporting to be signed by Spencer Duncan and Smith Duncan was indorsed to the plaintiff by the former. The name of Smith Duncan had been forged, but it was contended, and evidence introduced to prove, that after the delivery of the note he told the payee of the note that "it was all right." The court charged the jury that unless they should find that the said Smith Duncan had admitted that he had authorized his son, the other defendant, to affix his name to the note, they must find against the plaintiff, as the act of forging the name was not the subject of ratification. Exceptions to this charge were sustained by the general term, in a very brief opinion. The only authorities cited are: *Bank of Commerce v. Union Bank*, 3 Coms. 280, and *Thorn v. Bell*, Lalor's Supplement, 430. The *Albany Law Journal*, cited in the principal case, observes: "On examination we have been entirely unable to discover in what manner the first of these cases can be considered an authority in point. The learned judge closes his opinion as follows: 'I cannot perceive any reason why a person whose name has been forged may not adopt and affirm the signature as his own act, and thereby subject himself to whatever civil liability may follow from it.' It seems to us that there are several very excellent reasons against it; one is, that, there having been no pretended authority for the forgery, the doctrine of ratification does not apply; another is, that the promise to adopt the signature was really a promise given for the purpose and in the consideration of stifling a prosecution, and was therefore void as against public policy."

The case of *Greenfield Bank v. Crafts*, 4 Allen, 447, is an authority against the principal case. The court said: "The only question upon this part of the case is, whether a signature made by an unauthorized person under such circumstances as show that the party placing the name upon the note was thereby committing the crime of forgery, can be adopted and ratified by any acts and admissions of the party whose name appears on the note, however full and intentionally made and designed to signify an adoption of the signature. The defendant insists that it cannot by such evidence as would, in other cases, warrant the jury in finding an adoption; and that nothing short of an estoppel, having the element of actual damage from delay or postponement, occasioned by the acts of the person whose name is borne upon the note, misleading

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the holder of it, will have this effect. As to the person himself whose name is so signed, it is difficult to perceive any sound reason for the proposed distinction, as to the effects of ratifying an unauthorized act, in the two supposed ones." (The other case supposed was that of an agent honestly exceeding his authority.) "In the first case the actor has no authority any more than in the last. The contract receives its whole validity from the ratification. It may be ratified where there was no pretense of agency. In the other case, the individual who presents the note thus signed, passes the note as a note signed by the promisor, either by his own proper hand or by some one by his authority. It was clearly competent, if duly authorized, thus to sign the note. It is, as it seems to us, equally competent for the party, he knowing all the circumstances as to the signature and intending to adopt the note, to ratify the same, and thus confirm what was originally an unauthorized and illegal act. We are supposing the case of a party acting with full knowledge of the manner in which the note was signed, and the want of authority on the part of the actor to sign his name, but who understandingly and unequivocally adopts the signature, and assumes the note as his own. It is difficult to perceive why such adoption should not bind the party whose name is placed on the note as promisor, as effectually as if he had adopted the note when executed by one professing to be authorized, and to act as an agent, as indicated by the form of the signature, but who in fact had no authority. It is however urged that public policy forbids sanctioning the ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offense. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted, the guilty party was not to be prosecuted for the criminal offense." The only case cited by the court was *Forsyth v. Day*, *supra*.

The case of *Hefner v. Vandolah*, 62 Ill. 483; S. C., 14 Am. Rep. 106, is also against the principal case; but upon the foregoing review, and upon principle, we are inclined to think the principal case well decided.

UNION CENTRAL LIFE INSURANCE CO. v. POTTKER.

(33 Ohio St. 459.)

Insurance—life—fraud of insurer—rescission—forfeiture—remedy.

Where, by the terms of a policy of life insurance, the non-payment of the required annual premium, at the designated time, is declared to be a ground of forfeiture, but the uniform custom of the insurance company has been to give notice of the time when the premiums fall due, and to collect the same at the residence of the policyholder through a local agent residing in his neighborhood, this mode of collection cannot be discontinued, and payment required at the company's office, without notice to the insured; and where the insurance company, under such circumstances, with a view to avoid the policy, gives private instructions to the local agent not to give such customary notice to the insured, and not to call on him as usual, for the payment of the premium, no right arises to declare the policy forfeited,* and if the company refuses to accept the premium when duly tendered, and to give the insured

* To same effect, *Meyer v. Knickerbocker Life Ins. Co.* (78 N. Y. 516), 29 Am. Rep. 300, and note 305.

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the customary renewal receipt, the assured is in equity entitled to a rescission of the contract, and a return of the premiums paid thereon, with interest from the times of payment.

ACTION to rescind a policy of life insurance and recover premiums paid. The facts sufficiently appear in the opinion. The plaintiffs had judgment below.

Matthews, Ramsey & Matthews, for plaintiff in error.

J. Creutz, for defendant in error.

SCOTT, J. Had the plaintiff in error a right to declare the policy in controversy forfeited for the non-payment of the annual payment falling due October 31, 1873? Under the circumstances disclosed by the evidence offered on the trial, we are clearly of opinion that it had no such right.

A similar policy of insurance had been issued to plaintiffs below, by the Home Mutual Insurance Company, in 1868. This was effected through one Holtman, a local agent of the company, residing in the neighborhood of the assured. He took their application, received the premium then paid, and delivered the policy to them, agreeing at the same time that he would give them notice before the maturing of each annual premium, and would collect the same at their residence.

This arrangement was complied with by the parties, and the premiums were regularly collected at the residence of the assured, till October 14, 1871, when the risk was transferred to plaintiff in error, and the policy in question was substituted for that of the Home Mutual. Holtman's agency was continued by plaintiff in error; by him the change of policies was effected; and to him the assured paid the premiums falling due in 1871 and 1872. He collected these premiums as before, representing to the assured that the change of companies would induce no change in the manner of collecting the premiums. Whether this local agent, Holtman, had authority to bind the company by a verbal agreement at variance with the terms of the policy, we need not stop to inquire. The assured had a right to show what had been the uniform custom and practice of both the insurance companies in regard to the payment of premiums. On this uniform, and perhaps liberal, mode of dealing between the parties, the assured had a right to rely, and to assume that it would not be changed to

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their prejudice, without notice to them. Good faith required no less than this. For "forfeitures are odious, and enforced only where there is the clearest evidence that *that* was what was meant by the stipulations of the parties. There must be no cast of management or trickery to entrap a party into a forfeiture." *Helme v. Philadelphia Life Ins. Co.*, 61 Penn. St. 107.

But in October, 1873, the company not only failed to give notice to the assured, and send a collector, as usual, for the premium then falling due, but through its secretary and business manager, it actively intervened to prevent notice being given. The local agent was instructed not to call for the premium, and to give no notice to the assured of the time for its payment, in order that the company might get rid of this undesirable policy, by declaring it forfeited, if the premium was not paid on the day prescribed by its terms.

It is scarcely necessary to say that no right of forfeiture could arise from a default studiously procured by such disreputable strategy. Plaintiffs below, in their petition, characterize this conduct of the company as an attempt "to cheat and defraud said plaintiffs out of their moneys already paid;" and we think the evidence sustains the allegation.

Plaintiffs below, in a few days, ascertained that the local agent had resigned his position, and thereupon tendered the amount of the premium to the company, at its office in Cincinnati, and we think the acts of the company, in refusing to accept the premium, and give a renewal receipt therefor, as had been the usual custom, and in declaring the policy forfeited, were unmistakably wrongful and fraudulent.

But it is claimed by counsel for plaintiff in error, that if plaintiffs below were entitled to any redress, they have mistaken their remedy. Their amended petition in the court below is somewhat inartificial; but it evidently seeks a rescission of the contract evidenced by the policy of insurance, and demands thereupon a judgment against the company for the amount of the premiums which it has received from them, with interest thereon from the times of their respective payments. What other remedies were open to the insured? The policy contains but one express stipulation on the part of the insurance company, that is, to pay the sum in which the joint lives are insured to the survivor upon the death of either of them; provided the annual premiums are regularly paid, etc. Now, since the contingency upon which this liability of the company depends has not yet happened, could an action be maintained to recover damages for its

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breach? Counsel for plaintiff in error have argued at length, and with much force, that no such action could be maintained. Perhaps they are right, though upon this mooted question we express no opinion. It is enough to say that such right of action is by no means clear.

There are, no doubt, *implied* obligations devolved on the company by the terms of the policy, among which are the duty to accept and receipt for the annual premiums when duly tendered by the insured. Could an action be maintained to recover damages for the breach of such implied obligations, leaving the question of the company's liability on its express promise still open? It has recently been held by the Supreme Court of Connecticut that this cannot be done. *Day v. Conn. Gen. Life Ins. Co.*, 45 Conn. 480, S. C., 29 Am. Rep. 693.

We have no doubt that the plaintiffs below might, without resorting to equity jurisdiction, have adopted another course. They might have continued to render the premiums as they became due till the policy, by its terms, would become payable, and the survivor might then, by action on the policy, test the question of forfeiture. But this cause would furnish a very inadequate protection to the clear rights of the insured. For, as was said by the New York Court of Appeals: "The contract of insurance, where the policy is to be kept alive by periodical payments, is peculiar, and the duty to pay and the obligation to receive are mutual. It is somewhat different from a simple obligation to pay money, a tender to perform which would bar an action upon it. So, too, a receipt or acknowledgment of the payment is customarily given, and is as essential as evidence of the continuance of the contract as is the original policy. The policyholder is entitled to some evidence of the performance of the condition on his part, if, as is believed, the universal usage is for the insurers to certify in some way the fact that the annual premiums are paid. And it is fit and proper that both parties to the contract should know their rights; especially is it important to the insured that if the policy is avoided they may seek insurance elsewhere, and if valid, that they may perform the conditions of the policy." *Cohen v. N. Y. Mut. L. Ins. Co.* 50 N. Y. 625; S. C., 10 Am. Rep. 522.

For these and other reasons the equity jurisdiction of the court to declare the legal status and rights of the parties was, in that case, maintained. So, in *Hayner v. The American Popular L. Ins. Co.* 39 N. Y. 435, the same doctrine was held.

In the case before us the plaintiff in error sought, by an act of

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bad faith and dishonesty, to release itself from the whole obligation and liability incurred by its contract of insurance — it wrongfully refused to allow the insured to perform the contract on their part by paying the premiums as they matured — it refused to give them the proper and necessary evidence of the continued life of the policy, except upon terms which there is good reason to believe the company knew to be impossible. For while it was so anxious to forfeit the policy as to resort to dishonorable stratagem for that purpose, it voluntarily offered, as its secretary testifies, to renew the policy upon satisfactory proof of the continued good health and soundness of both the parties insured.

Under these circumstances, the insured having no adequate and clear remedy at law, we think they are entitled to relief in equity, either by a decree, which shall determine the status of the parties by adjudging the policy to be in full force, as was done in the New York cases to which we have referred, or by an entire rescission of the contract on just and equitable terms. And we think the party insured may elect whether he will have the contract specifically performed or entirely rescinded.

The insurance company has no right to complain if the insured demand a rescission of the contract which it wrongfully, and by an act of bad faith, has declared to be terminated by forfeiture, and which it refuses to perform on its part, by accepting and giving renewal receipts for the annual premiums when duly tendered. We think the only question is in regard to the terms upon which the rescission should equitably be ordered.

Plaintiffs below asked in their petition, that as a rescission, they should be allowed to recover back the premiums paid, with interest thereon from the times of payment. This measure of redress was granted them by the judgment of the court below, and the question arises whether the court erred in so doing.

In *McKee v. Phenix Life Ins. Co.*, 28 Mo. 383, it was held that where the defendant, the insurance company, had wrongfully determined the contract by refusing to receive a premium when due, the party insured had a right to recover all the money which had been paid under it.*

And in *Helme v. Phila. Life Ins. Co.*, already referred to, which was an action of the same kind, no doubt seems to have been enter-

* To same effect, *McCall v. Phenix Mut. Life Ins. Co.* (9 W. Va. 237), 27 Am. Rep. 558.

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tained by the Supreme Court of Pennsylvania of the right of the insured to recover back the premiums paid, if the company wrongfully refuses to receive a premium when duly tendered. And upon principle how stands the case? The plaintiff in error, by an act willfully wrongful, has declared its liability as an insurer terminated by a forfeiture of the policy, and refuses any longer to carry the risk assumed by the terms of its contract. And this it does before any loss has arisen to itself, or any benefit has been derived from the risk to the insured. The partial performance of the contract has been wholly on the part of the insured, and has consisted only in the payment of premiums. They have, so far, received nothing of value from the company which it might be against equity or good conscience to retain. They are in no better condition than they would be if no policy had been issued. If the company receives no compensation for the risk which it carried for several years, this result is attributable only to its own willful default. It cannot equitably be allowed to retain any part of the premiums received, whilst it wrongfully deprives the insured of all benefits which might hereafter arise to them from their payment. In regard to the compensation to which the insurer might equitably be entitled in a case where the risk is terminated without fault on his part, we think it unnecessary, for the purposes of this case, to inquire. We are of opinion that defendants in error were entitled to the relief which they asked and obtained in the court below.

It is objected, however, that the court below miscalculated the aggregate amount of the premiums paid, and the interest accruing upon them respectively, from the times of their payment, and rendered a judgment in excess of the true amount. We have made a computation, and find the objection is not without foundation. The evidence shows that the cash payments of premiums and interest made on the policies were as follows: October 31, 1868, \$34.37; October, 1869, \$51.37; October, 1870, \$51.37; October, 1871, \$39.47; October, 1872, \$37.43. Computing interest on these several payments, till the 1st of February, 1875, we find the aggregate sum to be \$268.89.

The court below rendered a judgment for \$305.84, which is found to be the amount of these payments, including interest thereon, till February 1, 1875. This was \$36.95 in excess of the true amount, and to that extent, the judgment below will be modified, and in all other respects be affirmed.

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As a result of this partial reversal, the costs of this proceeding in error will be equally divided between the parties.

JOHNSON, Chief Judge, did not sit in the case.

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(as Ohio St. 511.)

Carrier — inevitable accident — perishable property — sale thereof by carrier.

Peaches were delivered to a common carrier, at Fort Ancient, Ohio, on the eleventh and twelfth of the month, for transportation to New York city. The carrier shipped them by the New York Central railroad. On the evening of the twelfth, a bridge, near Utica on that railroad, was carried away by an extraordinary freshet; and when the peaches arrived there, it was found impossible to get them across, and as they showed signs of decay, the carrier sold them for the best attainable price for the benefit of the owner. *Held* (1), that the carrier was not liable for the loss, as it was owing to the inherent qualities of the freight; (2) it was not bound to seek another route; (3) it was justified in selling the property. (*See note, p. 567.*)

ACTION to recover the value of peaches delivered by plaintiff to defendant at Fort Ancient, Ohio, for transportation to New York city. The peaches were shipped September 11 and 12, 1868. At 9 o'clock P. M. of the latter day, a bridge, near Utica, on the New York Central railroad, the express route, was washed away by reason of heavy rains. Travel was thus interrupted for several days. When the peaches reached the break it was found impossible to get them around it, and as they showed signs of decay, they were sold by the express company. The plaintiff had judgment below.

Bowman, Pringle & Scott, for plaintiff in error.

Keifer & White, and *John F. Oglevee*, for defendant in error. Common carriers are only exempt from liability for loss or injury from the act of God, inevitable accident or the public enemy. The "act of God" must be the direct and immediate cause of the loss; it is no excuse that the loss was caused by the act of God concurring with other agencies. *Red. on Car.*, § 24, and note 2; *Merrit v. Earle*, 29 N. Y. 115; *Michaels v. N. Y. C. Ry. Co.*, 30 N. Y. 571; *Read v. Spaulding*, 30 id. 630; *Sullivan v. P. R. R.*, 30 Penn. St. 234;

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Condict v. G. T. Ry. Co., 54 N. Y. 500; *McArthur v. Sears*, 21 Wend. 190; 5 Bos. 395; *Turner v. Black Warrior*, 1 McCall (Cal.), 181. A carrier who undertakes the transportation of fruit is liable for loss by natural decay, if the transit be prolonged beyond the usual time. *Place v. Union Ex. Co.*, 2 Hilt. 19. It is the duty of carriers, by express, to know the condition of the route over which they ship. *Place v. Union Ex. Co.*, 2 Hilt. 19; Red. on Car., 54, 55, note 16, par. 6. The common carrier's contract *was to carry the goods to New York city within a reasonable time, and not to carry them by any particular route*. The defendant must show, affirmatively, that he could not deliver the goods by some other route. *Harmony v. Bingham*, 2 Ker. 99, 115; *Brig Collenberg*, 1 Black, 170. When an unexpected emergency arises, the carrier is bound to take such precautionary measures as prudent and skillful men in the same business and under like circumstances might be expected to take. *Davidson v. Graham*, 2 Ohio St. 139; *Nash and Chat. R. R. Co. v. David*, 6 Heisk. 261; *S. C.*, 19 Am. Rep. 594; *Holliday v. Kennard*, 12 Wall. 254; *Wallace v. Clayton*, 42 Ga. 443. If the ordinary line of transportation fails, another conveyance should be provided. *Van Buskirk v. Roberts*, 31 N. Y. 670; *Williams v. Vanderbilt*, 28 id. 223-4; *The Maggie Hammond*, 9 Wall. 458; *The Niagara v. Cordes*, 21 How. 24-26; *Collier v. Swinney*, 16 Mo. 484; Abb. on Shipping, p. 3, ch. 3, § 8, c. p. 242. Carriers are not justified in adopting a particular mode of forwarding the goods, and thereby delaying the delivery, merely because that is the usual mode adopted. Red. on Car., § 302, n. 1; *Hales v. London and Northwestern Ry. Co.*, 8 L. T. (N. S.) 421; *Collier v. Swinney*, 16 Mo. 484. The loss or damage to perishable articles in consequence of the weather, will not excuse the carrier, if it could have been prevented by due care and diligence. The carrier must show not only that it did all that was usual, but all that was necessary to be done under the circumstances. Red. on Car. 22, n; *Wing v. N. Y. and Erie Ry. Co.*, 1 Hilt. 235; *Philleo v. Sandford*, 17 Tex. 230.

WRIGHT, J. The first lot of peaches, shipped on the eleventh of September, Friday, reached Buffalo so as to leave that point Saturday night, the twelfth, arriving at Utica 3 o'clock Sunday morning. Here the car was stopped by the railroad company, as no means could be found to get around the break, which was twenty-eight miles further on. Upon the evidence we do not think the express

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company can be charged with a want of diligence in failing to get their freight past the obstruction. They seem to have used every exertion in their power to discharge their duty in this behalf. In order to get the goods over the break, it was necessary to wagon them about a mile and a quarter. As soon as the agents of the express company heard of the accident they repaired to the spot, and endeavored to forward their merchandise. They attempted to hire wagons, but the railroad company had anticipated them, and engaged all the teams and vehicles that could be found in the country, for the purpose of transporting passengers and their baggage. It was therefore not until Tuesday, the fifteenth, that any facilities of the kind could be had, and then the company began the movement of express stuff, but this was too late as far as the peaches were concerned. Nor was the express company in fault in the matter of the falling of the bridge, as is claimed. And for the purposes of this case it may be conceded that the express company is responsible for the default or negligence of the railroad company, if any there be.

The railroad company were about removing an old bridge at East Canada creek, for the purpose of building a new one of iron. As a temporary matter, a number of bents were put under the old bridge, to strengthen it. There then came a heavy rain; the testimony shows it to have been of unusual violence. The water rose rapidly, broke away dams, and carrying down logs and drift against the bridge, swept it off.

The evidence leaves it beyond a doubt that the storm and the freshet were altogether beyond anything of an ordinary character, and responsibility for this cannot be charged upon the railroad company. Nor can we find any fault in the railroad company in not repairing the damage sooner than was done, as would have been the case under ordinary circumstances. It is shown to be well provided against disasters of this kind. Duplicate bridges are kept on hand all the time, and as a general thing, a bridge can be replaced in from six to twelve hours. Upon this occasion, however, it was long before the water in the stream resumed its natural level, and this delayed the operations of the bridge builders.

But it is said that the express company, as soon as they heard of the break, should have diverted the peaches by some other route, so as to have gotten them to New York more speedily. It seems there was a route from Buffalo to New York, over the New York and

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Erie railroad, upon which the United States Express company ran; and it is also said that the peaches might have been brought from Utica back to Syracuse, and then delivered to the United States Express Company and shipped to New York by way of Binghamton; and again, that the peaches might have been delivered at Columbus, Ohio, and so have gone to New York by the Pennsylvania Central.

As to this last suggestion, the last lot of peaches left Fort Ancient at 6.20 Saturday night, and probably reached Columbus not far from the time the bridge was swept away, and there is nothing to show that the disaster was known at Columbus before the peaches reached there, so as to make the diversion a profitable thing.

As to bringing them back to Syracuse, this would have required a cartage at that point of about three-quarters of a mile, forty-eight hours to reach New York, and cartage again at Jersey City and ferriage across the river, all of which would almost certainly have involved a total destruction of the fruit, from the condition they were in, as will be hereafter seen.

As to diverting them at Buffalo. The first lot of eight bushels passed that point, leaving there at 6 P. M., three hours before the break. There can therefore be no possible reason for saying they should have been diverted there, as suggested. The other two lots left Buffalo during Monday. The United States Express Company, which ran from that point to New York, was a rival route, and there is no certainty it would have taken the property, which was perishable in its nature and already perishing in its condition. A reshipment would have involved delay, and such delay, as seems to us, would have been destructive.

Under ordinary circumstances this bridge might, and probably would, have been repaired in six hours, and travel resumed; it was fair for the express company to assume that this would be done, as doubtless would have been, had the water gone down at any usual rate, and they cannot be said to have been in fault in not anticipating what perhaps nobody thought was a probable or possible event.

There is an *ex post facto* wisdom, which, after everything has been done without success, can suggest that something else should have been attempted, but this is a sagacity much more astute than ordinary human foresight, and can hardly furnish a fair rule by which to determine the propriety of what has been done in good faith, and with judgment exercised under the best lights afforded.

Had the plan suggested been in fact pursued, and the peaches trans-

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shipped either by way of Syracuse or Buffalo, the delay which would have ensued, together with the rough jolting attendant upon the necessary cartage, would, as it seems to us, have insured their entire destruction. Thereupon the shippers might, with much force of argument, have said, we shipped by your route, and you had no right to make a deviation; by so doing you subjected our property to unusual delays and risks not contemplated, and loss having ensued, you are responsible. You should have gotten it around the break with all speed, or if that were impossible, you should have sold it to the best advantage, instead of taking a course which must have necessarily led to its entire loss.

But in our view of the facts, this loss was occasioned by the condition of the property at least as much as from any other cause. These peaches were picked and shipped on Friday and Saturday, the eleventh and twelfth of September. The overwhelming testimony is that the weather of that week was most destructive upon this kind of fruit. It was damp, rainy, warm and murky up to Thursday night, Friday being bright, warm and sunny. The effect of this temperature is described by the man who shipped the peaches as having a peculiar effect upon them. They rotted rapidly. An apparently sound peach would rot in twenty-four hours. A speck on a peach would in a few hours develop into rot. He says the week ending September twelfth was the most disastrous he ever saw. There is no controversy at all about the condition of the weather, and of its being exactly that kind that would destroy peaches in a very short time.

The first lot, shipped Friday, was to have reached New York for Monday's market, and could not have reached there earlier. They were stopped at the break, and the express agent at once concluded they ought to be sold. They were sold. This was on Sunday, before, it will be observed, they could by any possibility have reached New York, had they gone straight on without any break. What was their condition then? If spoiled and worthless, or nearly so, in Utica, could they have been any better in New York ten or twenty hours later in point of time? The express agent went to a fruit dealer in Utica to get him to buy the articles. The dealer went to see the peaches, Sunday, and told the agent he would take them if they were unloaded that night so as to get air, otherwise he would not take them on any condition. This dealer, who is a witness, describes Friday and Saturday as having been hot, sultry, rainy

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days—the worst kind of weather for fruit. He was on the car in which the peaches were, and says it was so close and sultry that it was very unpleasant to remain in it; that the condition of the weather was such that had they gone straight through, they would have been worthless upon reaching New York. He examined them Monday after they had been unloaded and given air, and none of them were sound. There is much testimony of this kind, all tending to show the unfavorable condition of the weather, that the car had been close and hot, that it was wet with moisture and vapor arising from the fruit, which had become heated and in such condition as to be past saving before it could have reached New York in the ordinary time. It therefore seems to us that the best thing to do under the circumstances was that which was done—namely, to sell the stuff at once. The express company did get one lot to Albany, but were compelled to sell them there.

These remarks, as to the condition of the fruit, apply to all the various lots. When they reached Utica, the testimony is without contradiction that they were in such plight that they could not have been got to New York in any way, or by any route, so as that they would at all have been marketable.

We have not gone into the evidence *in extenso*, but these conclusions are abundantly supported by it. We therefore feel bound to say that the loss of the peaches was occasioned not by any fault or negligence of the express company, but by the perishable nature of the article, in connection with the condition of the weather; and the delay which occurred at the break was something for which the express company was not responsible.

The jury however proceeded to render a verdict, an analysis of which shows that it was predicated upon the idea of the peaches reaching New York in a perfectly sound condition, as it is based upon the highest market price; it being at the same time perfectly apparent that had there been no break, the peaches could not have reached New York in a sound condition.

Among other things the court charged the jury:

“But if the defendant was prevented from sending them by that route in consequence of the washing away of a bridge, which did not happen through the negligence of the railroad company or the defendant, then it was the duty of the defendant, after first ascertaining that it could not send forward the peaches by that route, so as to get them to New York city in time to preserve them, to use

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ordinary care and diligence to employ some other safe and reliable route or agency, or express company, if such was then known and available to the defendant, by which the peaches could be carried through to New York city in time to save them."

This was misleading, in that it drops out of view the actual condition of the peaches at the time when they ought to have been sent forward upon this supposititious other route. Clearly, if they were rotten and entirely worthless upon reaching the point where this transshipment could have been made, there would have been no sense in sending them on. The jury should have been told to take into view the circumstances as they actually were — the condition of the weather and of the fruit — and under proper instructions should have determined whether the company were bound to seek some other route for transportation.

In the view, however, that we take of the evidence, plaintiffs made no case for recovery, and the judgment should be reversed.

Judgment reversed.

NOTE BY THE REPORTER.— In *Place v. Union Express Co.*, 2 Hilt. 19, the defendant agreed to transport fruit from New York to Milwaukee, within twelve days, stipulating, among other things, for exemption from liability from unavoidable or extraordinary casualty, and from natural tendency to decay. Owing to a crowd of freight on a connecting road there was a delay of twenty days, and the fruit decayed. There was another connecting road, but the defendant had no arrangements with it. It was held that the defendant was liable for the loss, notwithstanding a stipulation that it should pay the plaintiff five cents per 100 pounds for every day's delay beyond the twelve days. The court said, the stipulation for exemption from liability for decay, "must be understood as applying to decay or injury to which the fruit might be subject during the prescribed time within which the defendant undertook to deliver it at Milwaukee." "Even if no time had been agreed upon, the defendants would have been bound to have completed their contract within a reasonable time, and if they had failed to do it within that time without legal excuse, and the property afterwards and before delivery had become injured from its natural tendency to decay, they would have had to make good the loss." So, the carrier is liable for injury by the heating of corn where the transportation is delayed beyond a reasonable time. *Illinois Cent. Ry. Co. v. McClellan*, 54 Ill. 58; *S. C.*, 5 Am. Rep. 83.

A common carrier has been held for leakage. *Warden v. Greer*, 6 Watts, 424; *Phillips v. Clark*, 2 C. B. (N. S.) 156. But not where the leakage was from the inherent defect of the cask. *Heddon v. Bowndale*, 2 H. & N. 575. Here the court say, "A carrier is not responsible for damage arising from any inherent defect in an article delivered to him to be carried." But even if he stipulates for exemption in such case, he is still liable for gross negligence. *Phillips v. Clark*, *supra*; *Merchants' Dispatch and Trans. Co. v. Comfort*, 3 Colo. 280; *S. C.*, 35 Am. Rep. 757. A carrier of animals is not liable for injury in consequence of the conduct or propensities of the animals. *Mynard v. Syracuse, etc., R. R. Co.*, 71 N. Y. 180; *S. C.*, 27 Am. Rep. 28.

In *Nelson v. Woodruff*, 1 Black. 156, it was held that hog's lard having certain qualities which make its leakage from ordinary barrels or wooden casks unavoidable in hot weather, a person who ships it in that condition from a southern port for a long voyage through low latitudes in mid summer, takes upon himself the risk of all loss proceeding from that cause. In *Warden v. Greer*, 6 Watts, 424, it was held that a carrier was not liable for loss of molasses caused by its fermentation and expansion, nor for leakage from secret defects in the casks. But it was there held that the carrier could not thus account for a loss of 2,000 out of 10,000 gallons, in contradiction of his bill of lading, reciting the receipt in good condition.

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In *Ship Howard v. Wisman*, 18 How. 231, the carrier was held not liable for potatoes shipped when wet and decaying on the voyage. And the same was in effect held as to a cargo of fruit, in *Brig Collenberg*, 1 Black. 170.

In *Brown v. Clayton*, 12 Ga. 580, the court said: "If goods are shipped in good order, and by reason of inherent causes, without default on their" (the carriers') "part, deteriorate on the voyage, I cannot believe for a moment that they would be liable to make good that deterioration. For example, a cargo of oranges shipped at Havana, for Liverpool, and decaying on shipboard. The language of Chancellor Kent, before quoted, to wit: 'The carrier is no more an insurer of the soundness of the cargo, as against the perils of the sea, or its own intrinsic decay, than he is of the price in the market to which it is carried,' asserts the true rule."

Whether a carrier is bound to give perishable property the precedence in transportation has been debated.

In *Swetland v. Boston and Albany R. R. Co.*, 102 Mass. 276, a freight train of nine cars became obstructed by a snow storm, so that only four cars could be forwarded. Among the cars left was one with a load of apples. It was held that the defendant was not bound to forward that car in preference to others containing freight not liable to injury by freezing. The court said: "Nothing is required of him in respect to such risks but the use of due care. If the owner of goods, which are liable to injury by freezing, chooses to send them at a season of the year when they are exposed to such a risk, he takes the risk himself. The conductor was bound to assume that it was important to each owner of freight that his property should be carried with all reasonable care and speed, as the company had undertaken to do and had directed him to do, and he could not know that the speedy delivery of the contents of the other cars was not more important than that of the apples."

In *Pest v. Chicago and N. W. Ry. Co.*, 20 Wis. 594, it was held that there is no invariable rule requiring freight to be carried in the order in which it is received, without regard to its character or condition, or its liability to perish. The instructions complained of were that press of freight will not excuse failure to carry in ordinary time, unless freight is carried in the order in which it is received, and that in case of press of freight and consequent delay, a carrier has no right to give preference to freight of one person over that of another. These were held erroneous, the court observing: "If the carrier received for transportation goods perishable and those not so at the same time, and there were a press of freight, so that he could not transport and deliver all before the perishable goods would perish, but could deliver the perishable in time to save them, if the delivery of the others was delayed, can there be any doubt what his duty would be? Can there be any doubt that a preference in such a case would be reasonable, and if reasonable that the perishable goods, if they did not have the preference, would not be delivered in a reasonable time, and the carrier would be liable?" In this case the delay sued for was caused by press of freight and preference in transportation of perishable property, and this preference was held justifiable. In the Massachusetts case, *supra*, it was held that the carrier was not bound to give such preference.

In *Tierney v. New York Central and Hudson River Railroad Company*, 76 N. Y. 205, the plaintiff, on January 6, 1878, delivered to, and loaded upon one of defendant's cars, at Albany, a car load of cabbages for transportation to New York, and paid freight thereon. On the car was placed a placard, signed by defendant's general freight agent, containing the following: "Perishable property; this car must run to New York by first train." A way bill was delivered to plaintiff, showing shipment from Albany, January seventh. The car left Albany and arrived at East Albany at 10.40 P. M. of that day; at 10.50 a freight train started thence for New York; the car remained until 2.30 P. M. of January ninth, when it proceeded to New York. On arrival the cabbages were found to be frozen. The usual time required for a freight train to go from Albany to New York is from ten to eleven hours. In an action to recover for the loss, it appeared that if the cabbages had been delivered in the ordinary course of business, they would not have been frozen. Defendant's evidence tended to show that the car, on its arrival at East Albany, was switched on to a side track and blocked up by cars subsequently arriving, so that it could not be moved until they were sent forward. It did not appear that any sudden emergency arose interfering with the ordinary use of the road, or that the amount of freight was unusual, or exceeded the capacity of defendant to remove it, or that the freight sent forward after the car arrived was made up of freight received before. *Held*, that the facts justified a verdict for plaintiff. The court charged, in substance, that it was the duty of defendant to transport the cabbages

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by the first train, unless a reasonable and proper excuse for the delay was shown, unless there was such a pressure of property of a similar kind which arrived before as to make it impossible; that if there was a pressure of freight this car should have been forwarded before forwarding ordinary non-perishable property. *Held*, no error. The court also remarked, *obiter*, by DANFORTH, J.: "But if the charge of the trial judge is construed as instructing the jury that the pressure of non-perishable property should not excuse the delay, I am of the opinion that he was right and the principle of law enunciated by him, sound. *Widert's Case*, 12 N. Y. 245, is not to the contrary. There the question was not presented as to the duty of a carrier to discriminate in favor of perishable freight over non-perishable. That decision therefore should not control this case. It is itself placed upon a qualification to the peremptory direction of the statute, and while it should be followed in similar cases, is not to be extended. The distinction suggested by the charge exists. In *Cope v. Cordova*, 1 Rawle, 203, the court, while holding that the liability of the carrier by vessel ceases when he lands the goods at a proper wharf, adds 'it is beside the question to say that perishable articles may be landed at improper times to the great damage of the consignee — when such special cases arise they will be decided on their own circumstances.' Such a case was presented to this court in *McAndrew v. Whitlock*, 52 N. Y. 40, where a carrier was held liable for the loss of certain perishable property, licorice, under circumstances which would have exonerated him from liability if it had not been perishable. In *Marshall v. N. Y. C. R. R. Co.*, 45 Barb. 502; affirmed by this court, 48 N. Y. 660, it was held by the Supreme Court that where two kinds of property, one perishable and the other not, are delivered to a carrier at the same time by different owners for transportation and he is unable to carry all the property, he may give preference and it is his duty to do so, to that which is perishable. In this court the case turned upon other points, but referring to the rule above stated, HUNT, J., says, 'the principle laid down is a sound one and in a proper case would, I think, be held to be the law. It is not here important.'

"The rule is a correct one and is equally applicable to the duty of the carrier in whose hands freight has so accumulated that he must give priority to one kind over another.

"In requiring the defendant to receive all kinds of property, including perishable, the statute may be construed as imposing upon it such obligations and duties as are required for the proper and safe carriage of that kind of goods. In that respect assimilating a railway corporation to a common carrier, bound by the obligations of the common law to carry safely and immediately the goods intrusted to him — having in the exercise of care, speed and priority of transportation some reference to the natural qualities of the article and the effect upon it of exposure to the elements. *McAndrew v. Whitlock*, 52 N. Y. 40; *Marshall v. N. Y. C. R. R. Co.*, 48 id. 660; *Peet v. Chicago and N. W. R. R. Co.*, 20 Wis. 594. We may also take into consideration the fact that the freight in question was not only perishable, but was known to be so by both parties, and was shipped as such, and with knowledge on the plaintiff's part of the custom of the defendant to give a preference in transportation to such goods, and the parties, though silent, may be regarded as adopting the custom as part of the contract. *Cooper v. Kane*, 19 Wend. 386; *Peet v. Chicago and N. W. R. R. Co.*, 20 Wis. 598.

"In such a case the pressure of other property non-perishable should furnish the defendant no excuse. It knew the condition of its tracks and its ability or inability to move the freight on hand, but the plaintiff knew neither of these things. When the cabbages were delivered to the defendant its agents were well aware of the hazard to which the property would be exposed by delay; they knew that the plaintiff expected it to go forward at once, and they received it not as warehousemen to store, but as carriers to transport; they were not bound to receive it until a reasonable time before the time fixed by public notice for the starting of a train, at which time the statute declares they shall furnish sufficient accommodation for its transportation and assumes that they will then be ready to forward it. *Faulkner v. S. P. R. Co.*, 5 Mo. 311. Its reception was therefore in itself an assurance to the plaintiff that it should at once and without delay be sent to its destination. The defendant took the property from out of the plaintiff's keeping, received his money for transportation, and by these acts took upon itself the risks of detention, and thereby undertook to make good all damages which were the natural and necessary consequence of unreasonable delay; as much so as if it had executed an express contract to that effect. In determining whether there was or not such delay the character of the freight offered may well be taken into consideration. If, as is suggested in the *Widert Case*, 'the owner of property destined to a market may always be presumed to desire its arrival at the earliest practicable

American Express Company v. Smith.

time,' and therefore the carrier should, in the absence of any cause for delay, send it immediately forward, it would seem that the carrier, receiving more property than he could at once transport, some of which, from natural causes or the action of the elements, may be deemed perishable, should give such property a preference in transportation over other property in his hands. In no other way could its delivery in a reasonable time be assured. The very receipt of the property in question, under the circumstances adverted to, imposed a duty upon the defendant to forward it at once, and for the damages occasioned by its default the plaintiff is entitled to recover. Doubtless the defendant, as was lawful, measured the compensation it should receive in part by the hazard it incurred and the extra care and diligence imposed upon it by the fact that the articles were perishable. The obligation would not have been other or different had there been an express agreement. Of the carrier, Lord Coke says: 'He hath his hire and thereby impliedly undertaketh the safe delivery of the goods delivered to him;' and in *Hollister v. Nowlen*, 19 Wend. 288, the court say: 'The carrier may no doubt demand a reward proportioned to the services and the risk he incurs, and having taken it he is treated as an insurer and bound to the safe delivery of the property. But the extent of his liability does not depend on the terms of his contract. It is declared by law.' Again: 'It is not the form of the compact but the policy of the law which determines the extent of the carrier's liability.'

"If we assume, then, that there was evidence in the case tending to exonerate the defendant, it was submitted to the jury with proper instructions and the judgment appealed from should be affirmed."

CHURCH, Ch. J., MILLER and EARL, JJ., concurred; FOLGER, RAPALLO and ANDREWS, JJ., dissented.

In *Marshall v. N. Y. C. R. Co.*, cited, *supra*, the question of perishability of the property in suit was not involved, but it was said that the delay in transporting the property in question being caused by the transportation of perishable property, it was excusable. As the court said, in 45 Barb. 506, "it was a mere abstract remark, not essential to the case, and one which could have not done any injury if erroneous. But I am not prepared to say that it was erroneous," etc.

In *McAndrew v. Whitlock*, 52 N. Y. 40, the defendant carried for plaintiff, from Liverpool to New York, cases of licorice, and was notified that it was perishable, and must be delivered only on a fine day. The parties agreed on the arrival that the goods should be delivered September twentieth, if the day were fine. On that day it rained till 9 A. M. and then cleared up, but rained again at 2.30 P. M., and from 4.30 P. M. the rest of the day and night. The defendant, notwithstanding, unloaded the goods, and they were damaged by the rain, in spite of the consignee's diligence. The defendant was held liable.

Mr. Schouler (Bailments, 397) thus states the rule: "But losses due to the natural decay, deterioration and waste of the things carried, are excusable; and such also as may be fairly attributed to the wear and tear of the journey; all this, however, with reference to the nature and inherent qualities of the articles in question, their unavoidable exposure at the time and place, and under the general circumstances, while in charge of a carrier of ordinary prudence, and the condition in which the shipper may have chosen to intrust them to the carrier for the particular transportation. For example, where liquors evaporate, effervesce, sour, or burst the bottles, or leak out of the casks in which they were consigned (for whose imperfections the carrier is no more answerable than for their own inherent qualities), the loss is not the carrier's, unless he occasioned it by remissness of duty. Nor where meat taints, lard melts, oranges and lemons rot, salt loses its savor, or eggs grow stale, is the carrier necessarily under obligation to replace the goods in quantity or quality, or stand to the loss in damages. The broad ground of all such exception is 'act of God;' or in other words, that natural causes must be allowed their natural and inevitable operation during the accomplishment of the bailment purpose, provided the bailee pursue his course with ordinary care and diligence. This doctrine may often be found reinforced by that other reason of exoneration to be later discussed, the fault of the owner or customer himself. For the common sense of carriage undertakings forbids that the carrier should warrant by implication the quality of what he simply conveys for the true owner."

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EDGAR V. RICHARDSON.

(83 Ohio St. 581.)

Marriage — divorce — evidence — estoppel.

A wife deserted her husband, and after being defeated by him in an effort to obtain a divorce, went to parts unknown, and remained away about three years. On her return to the neighborhood of her husband, she declared that during her absence she had obtained a divorce, but declined to tell where she had been. A few years after, her husband, with a view of marrying again, sent a messenger to inquire of her as to the truth of the alleged divorce, to whom she stated that she went away to procure a divorce without interference from her husband, and that she did obtain a divorce, and hoped he would marry again. Soon after, he married the defendant, and about the same time, his first wife also married again. A few years later, the first husband died childless and intestate; thereupon his first wife, claiming to be his heir, conveyed a tract of land, of which he died seised, to the plaintiff, who brought this action against the second wife to dispossess her of the land; and on the trial of the case, the first wife testified that she never procured a divorce. *Held* (1), that the admissions of the first wife, that she had obtained a divorce, though relating to a matter of record, were as against a party claiming under her, admissible in evidence; (2), A finding upon such evidence, even if not amounting to an estoppel, and in accordance with the truth of such admissions, though contradicted by her unsupported testimony, would not be clearly against the evidence, and therefore could not be regarded by a reviewing court as erroneous.*

ACTION to recover land. It appeared that both parties claim title under John Edgar, who died childless and intestate. His title to the land descended to his widow. In 1841 he was married to Sarah Ann Dubbs, who survived him and conveyed the land to the plaintiff. After the marriage of Edgar and Sarah Ann, they lived together about fourteen years, when Edgar took up his residence in Wood county; but his wife refused to live with him, and after about a year applied for a divorce. Edgar opposed the divorce, and she was defeated. She then went away and remained for about three years, when she returned to her father's house, in the neighborhood of her husband, and said to her relatives and acquaintances that during her absence she had obtained a

* As to estoppel, see *Rusk v. Fenton* (14 Bush, 490), 39 Am. Rep. 412.

divorce, but always refused to tell where she had been. Edgar continued to reside on his farm, and Sarah Ann, soon after her return, made Toledo her place of residence, where she stated and caused it to be believed that she had obtained a divorce from John Edgar. After a few years, Edgar desiring to marry, sent the father of Sarah Ann to Toledo to ascertain from her the truth about her alleged divorce. She assured her father that she went away without letting Edgar know where she was, so that she could obtain a divorce from him, and did obtain a divorce, and showed him some papers to confirm it; and on being told that Edgar desired to marry again, she said that she wished he would marry again. This being communicated to Edgar soon after, and on the 28th of May, 1862, he married Fidelia Richardson, and they lived together as husband and wife until his death in 1866. About the same time that Edgar married Fidelia, Sarah Ann married one McKessick, with whom she has ever since lived. The plaintiff gave in evidence the deposition of Sarah Ann McKessick that she married John Edgar in 1841, and never was divorced from him. The defendant had judgment.

Tyler & Meehan, James Murray and James R. Tyler and H. H. Dodge, for plaintiff in error. There is no proof in this case showing that Sarah Ann was divorced in fact. But even if Sarah Ann had obtained a divorce, it being admitted that her husband had no notice, it was void, and her second marriage was void. *McGiffert v. McGiffert*, 17 How. Pr. 18; *S. C.*, 31, Barb. 69; *Hoffman v. Hoffman*, 55 Barb. 269; *S. C.*, affirmed, 46 *N. Y.* 30; *S. C.*, 7 Am. Rep. 299; *Shannon v. Shannon*, 4 Allen, 134; *Smith v. Smith*, 13 Gray, 209; *Cox v. Cox*, 19 Ohio St. 502; *S. C.*, 2 Am. Rep. 415. Sarah Ann being a *feme covert* at the time, even if she was the owner of the lands in controversy as her separate estate, she could not be deprived of the same by conduct amounting to an *estoppel in pais*; for she would not be estopped by her deed if it was not executed in conformity with the statute, and what she cannot do directly, she cannot do indirectly. *Todd v. Pittsburg, Fort Wayne and Chicago R. R. Co.* 19 Ohio St. 514; *Miller v. Hine*, 13 Ohio St. 565; *Glidden v. Strupler*, 2 Smith (Penn.) 400; *Stevens v. Parish*, 26 Ind. 260; *Lowell v. Daniels*, 2 Gray, 161; *Jackson v. Hobhouse*, 2 Mer. 282; *Nicoll v. Jones*, 36 L. J. Eq. 554. Under the statute of frauds, it is not permissible that an *estoppel in pais* should work a transfer of the legal title to land. *Hayes v. Livingstone*, 34 Mich. 384, *S. C.*

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22 Am. Rep. 533; *Parker v. Barker*, 2 Meto. 423; *Swick v. Sears*, 1 Hill, 19; *Davis v. Davis*, 26 Cal. 23; *Doe v. Walters*, 16 Ala. 714; *Mills v. Graves*, 38 Ill. 455-466; *Blake v. Fash*, 43 Mich. 302; *Ryder v. Flanders*, 30 Mich. 336; *Glidden v. Strupler*, 52 Penn. St. 400.

F. & D. K. Hollenbeck, for defendant in error. A party is estopped from denying his or her own acts, declarations or admissions, which were designed to influence the conduct of another, and did influence it, when such denial will operate to the injury of the latter. *Pickard v. Sears*, 6 Ad. & E. 469; *Hutton v. Rosseter*, 31 Eng. L. & E. 231; *Kinney v. Farnsworth*, 17 Conn. 355; *Brown v. Wheeler*, id. 345; *Roe v. Jerome*, 18 id. 138; *Middletown Bank v. Jerome*, id. 443; *Martin v. Angell*, 7 Barb. 407; *Whitacre v. Culver*, 8 Minn. 133; *Douglas v. Scott*, 5 Ohio St. 194-197; *Bocock v. Pavey*, 8 id. 281. The particular intention or design with which the declarations are made, or acts done, is not material, so that the natural consequence of the words or conduct influences another to change his or her condition. Broom's Leg. Max. 219, and authorities cited; 1 Greenl. Ev. § 207, and authorities cited; *Hicks v. Cram*, 17 Vt. 449; *Rangely v. Spring*, 8 Shep. 130; *Otis v. Sill*, 8 Barb. 102; *Hall v. Fisher*, 9 id. 17; *Edmondson v. Montague*, 14 Ala. 370; *Lawrence v. Brown*, 1 Seld. 394; *Carpenter v. Stilwell*, 12 Barb. 128; *McClellan v. Kennedy*, 8 Md. 230; *Morris Canal Co. v. Lewis*, 1 Beas. 323; *Mitchell v. Reed*, 9 Cal. 204; *Preston v. Mann*, 25 Conn. 118; *Thompson v. Thompson*, 9 Ind. 323; *Quirk v. Thomas*, 6 Mich. 76; *Manufacturer's Bank v. Hazard*, 30 N. Y. 226.

DAY, J. The errors assigned present two questions: 1. Did the court err in permitting the defendant to prove admissions of the grantor to the plaintiff, that she and her husband, John Edgar, were divorced? 2. If not, is the judgment unsustained by the law and the evidence?

1. The plaintiff sought to establish his title to the land in dispute through a deed to him from Sarah Ann Edgar; he was therefore in privity of estate with her, and for that reason, her admissions before the conveyance, which would have been admissible against her had she been plaintiff in the action, were admissible against him. 1 Greenl. Ev., § 189.

He could recover only upon the strength of her title, which

depended solely upon her being the wife relict of John Edgar, deceased. To establish that fact, the plaintiff proved that Sarah Ann married Edgar in 1841, and that he died in 1846 without issue. The plaintiff rested on the presumption that she continued to be the wife of Edgar until his death. To rebut this presumption the defendant was permitted to prove, by said Sarah Ann's admissions during the time she claimed to be Edgar's wife, that she had procured a divorce.

This evidence was objected to on the ground that a divorce is a matter of record and cannot be proved by secondary evidence. This objection loses much of its force from the fact that the person who made the admissions, and whose interests were affected thereby, refused to disclose where the record could be obtained, thus putting it out of the power of the defendant to prove the alleged divorce by the record if it existed; therefore the admissions of Sarah Ann were, by reason of this concealment, the best evidence attainable by the defendant.

But admissions of a party relating to the contents of written instruments, in general, are not regarded as secondary evidence, and though they relate to a record, if the place where it can be obtained be concealed by the party, they should form no exception to the rule.

The competency of such admissions as primary evidence, it is true, has often been denied, but the weight of authority, both in England and America, favors such admissibility. In *Earle v. Picken*, 5 C. & P. 542, it was said by Mr. Justice PARKE: "What a party says is evidence against himself, as an admission, whether it relate to the contents of a written paper, or to any thing else." In *Smith v. Palmer*, 6 Cush. 513, it was observed, by the judge delivering the opinion of the court, that "a party's own statements and admissions are, in all cases, admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record." Accordingly, it was held in that case that admissions of a party relating to a matter of record, were admissible. In *Slatterie v. Pooley*, 6 M. & W. *664, which is the leading case on the subject, PARKE, B., said: "There have been many reported decisions, that whatever a party says, or his acts amounting to admissions, are evidence against himself, though such admissions might involve what must necessarily be contained in some deed or writing; for instance, a statement by a party, or one under whom he claims, that an estate had been conveyed to, or from

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such person, or that such person filled the character of assignee, which only could be by deed, or the like." This extract from Baron PARKE, not only maintains the principle in question, but it shows that it equally applies to the admissions of persons in privity with the party.

In *Regina v. Basingstoke*, 14 Q. B. 611, it was held by the Queen's Bench, that the same principle applies to the acts of a party which amount to an admission of matters relating to written instruments; and in delivering his opinion, PATTERSON, J., said: "*Slatterie v. Pooley* establishes that, if a party by words admits the contents of a written document, such an admission is legal evidence against him; not as secondary evidence of the contents of the written instrument, but as original evidence. Such an admission is like an estoppel, and as is well put in a note to the case of the *Duchess of Kingston*, in Smith's Leading Cases, it is used, 'not to supply the absence of the ordinary instruments of evidence, but to supersede the necessity of any evidence by showing that the fact is already admitted.'" Upon this principle it is that the admissions of a party, or of those under whom he claims, are admitted, in connection with other evidence, to raise an estoppel; "and so, too, has it been held, that an admission which is of the same nature as an estoppel, though not so high in degree, may be allowed to establish facts, which, were it not for the admission, must have been proved by certain steps appropriated by law to that purpose." 2 Whar. Ev., § 1086.

It is claimed in the case before us, that the admissions of the person under whom the plaintiff claims, in connection with other evidence, worked an estoppel, and was conclusive of the fact that she had obtained a divorce, and so was not the wife relict of John Edgar, deceased, and if they do not rise to so high a degree, that they are admissible as evidence, to be considered in determining whether she had in fact obtained a divorce. But the question we are now considering, is not the weight and value of the testimony; it relates solely to its admissibility. Upon that point, the principle of the case of *Slatterie v. Pooley*, has been followed in *Wolverton v. State*, 16 Ohio, 173; *Loomis, Adm'r, v. Wadhams*, 8 Gray, 557; *Taylor v. Peck*, 21 Grat. 11; *Howard v. Smith*, 3 Scott's N. R. 574; *Murray v. Gregory*, 5 Ex. 468; *Pritchard v. Bagshawe*, 11 C. B. 459.

Having shown that admissions of a party, relating to matters contained in written instruments or records, are not excepted from the general rule allowing such admissions to be given in evidence, the

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point under consideration falls within the principles announced by Mr. Justice CATRON, in delivering the opinion of the court, in the case of *Gaines v. Relf*, 12 How. 472, 530, as follows :

“If Zulime was now before the court, claiming her marital interest in Clark’s estate, her declarations made during the alleged coverture tending to show that she was not the wife of Clark, but of Desgrange, would be admissible against her ; and if so, they are also admissible against any one who asserts the same title derived from her, after the declarations were made. Such a case is an established exception to the rule of evidence, excluding declarations of third persons not parties to the record. A declaration emanating from the claimant of any estate, which afterward comes to the parties on the record, by descent or purchase, affecting adversely the estate acquired, may be given in evidence against the party to the record who claims the estate.”

There was then no error in admitting the evidence of the admissions of Sarah Ann, the grantor of the plaintiff, made during her alleged coverture, tending to show that she was not the wife relict of John Edgar, deceased.

2. The remaining question arises upon the overruling of the motion for a new trial. The ground of the motion was, that the judgment was against the law and the evidence.

The plaintiff made a *prima facie* case, entitling him to recover. If therefore the judgment in favor of the defendant can be sustained at all, it must be upon the ground that the evidence was such as to warrant the court in holding, either that Sarah Ann was in law estopped from denying her declarations that she was divorced from her husband, John Edgar, or that she had in fact obtained such divorce.

The court made no special finding of facts from the evidence; therefore, in looking to the evidence, we must, as a reviewing court, assume, in support of the judgment, the facts to be what the evidence would finally warrant the court to find as the facts of the case.

It is clear that Sarah Ann undertook, and intended to induce the belief, in whatever neighborhood she resided, that during her absence of three years in parts unknown, she had obtained a divorce. It is also quite clear that after waiting in doubt about the matter for five years, John Edgar, desiring to marry again, if he might lawfully do so, sent her father to learn from her what he might rely upon as the truth about her having obtained a divorce; that she

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sent back to him assurances of having obtained a divorce; and that she intended to induce him to believe it, knowing that he might, in reliance on such belief, materially change his condition. The evidence further leaves the strong impression that both Edgar and Fidelia Richardson believed and upon the faith of Sarah Ann's declarations consummated their marriage.

It is true that Sarah Ann had no direct communication with Fidelia; but she undoubtedly intended that her assurances of a divorce sent to Edgar should be communicated, as they in fact were, to the woman he desired to marry. The very object of such assurances was to induce his marriage; and from the nature of the transaction, it must have been equally her intention that another should be influenced thereby.

Though Sarah Ann did not directly bring about the marriage of Edgar and Fidelia, the court was warranted in finding, from the evidence, that she induced them to believe, that as against any marital right of her's, they might lawfully marry.

Having acted upon her assurances, and in accordance with her expressed wishes, a strong case was made, which, but for reasons not affecting the substantial justice of the case, called for the application, as against her, of the principles of the law which would estop her from denying the truth of her declarations.

But conceding that the declarations of Sarah Ann do not strictly rise to the degree of an estoppel, or cannot be regarded as conclusive, still the question remains whether the court was clearly unwarranted in finding, from the evidence, that Sarah Ann had been divorced. This question is left to be determined solely upon her own acts and declarations during the alleged coverture, and her testimony in the case. But the point for our determination, as a reviewing court, arising upon this state of the case, is not whether such divorce had in fact been obtained, but whether a finding by the court below that it had, would be clearly unwarranted by the evidence.

In support of a finding that the divorce had been obtained, there are the declarations of Sarah Ann, strenuously persisted in during a series of years, that it had been obtained. These declarations are corroborated by undisputed facts. She tried to get a divorce with the knowledge of Edgar; after she was defeated by him, she went to parts unknown, avowedly for the purpose of getting a divorce; she was absent during a period sufficiently long to get it; she exhibited to her father papers to show that she had; she induced her hus-

band to marry again; she married again herself. If not divorced, she knowingly was instrumental in bringing herself and her husband into a state of bigamy, and two other persons into that of adultery. Surely, since she concealed the place where the divorce was obtained, a stronger case to establish a divorce, as against her, could not be made. But now, to establish her heirship to the property of the decedent, she has, in a distant State, given her deposition that she never obtained a divorce. In the light of the evidence in the case, her testimony in a matter affecting her own interest cannot be regarded as conclusive.

Her declarations may not rise to the degree of an estoppel against her to deny the truth of her declarations. Nor was the court below estopped from regarding her declarations, supported by the corresponding acts of her life for many years, as more convincing than her testimony now given to win the estate left by the husband she deserted, and if her declarations be not true, had fraudulently led into the belief, that as against any marital claim of her's, he might safely die intestate. We cannot say that manifestly the court would not be warranted in finding in accordance with her declarations, corroborated by the acts of her life. Clearly such a finding would be supported by evidence — evidence, too, the truth of which Sarah Ann cannot deny without impeaching her own credibility, and can deny only for the purpose of obtaining what, in justice, should be denied to her.

Since, then, the Court of Common Pleas would not be clearly unwarranted in finding, from the evidence, a state of fact that would in law sustain its judgment in favor of the defendant, the judgment of the District Court affirming that of the Common Pleas must be affirmed.

Judgment affirmed.

Haynes v. Haynes.

HAYNES v. HAYNES.

(33 Ohio St. 508.)

Will — execution — adopted subscription — acknowledgment.

Where a will has been signed for the testator by another person in his presence and by his express direction, in the absence of the attesting witnesses, the requisite acknowledgment of the fact by the testator in the hearing of the witnesses, need not be in any particular form of words, nor any specified manner, but if the witnesses are made to understand by signs, motions, conduct or attending circumstances, that the testator acknowledges the signature as his, and the instrument as his will, it is sufficient; it is not necessary that the testator should acknowledge to the attesting witnesses that such signing was in pursuance of his previous express authority and in his presence; and the fact of such signing and of such authority may be shown by the acknowledgment to the witnesses, or by other competent testimony, or may be presumed from the facts and circumstances.

ACTION to contest a will. The opinion states the facts. The will was established at the trial.

Harrison, Olds & Marsh and *John S. Brasse*, for plaintiff in error. The writing produced was not signed by Frederick Haynes, deceased; his name was subscribed thereto by Jeremiah Hall; but, such subscription was not made in the presence of the attesting witnesses. The instrument was not, therefore, executed in conformity with the second section of the wills act, and is invalid as a testament. The statute, in terms, requires such signing to be done, not only by the express direction of the testator, but in his presence. It must, therefore, it would seem, be done at the time of its adoption by the testator; for to what other time can his adoption of the act be referred? Where the testator signs himself, and he afterward acknowledges that fact, he does not adopt an act done by another. But where the signing is by another person, and is out of the presence of the attesting witnesses, and the testator subsequently acknowledges such signing, the acknowledgment is simply the adoption of the signing by another, and not of an act done by the testator himself. *Dunlap v. Dunlap*, 10 Watts, 153; *Cavett's Appeal*, 8 W. & S. 25; 3 Curw. S. 1900, note to § 2, Wills Act. If the signing of the instrument by another person than the testator, and the direction to so sign may

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be done out of the presence and hearing of the attesting witnesses, there must at least be an acknowledgment to each of them, at the time of their act of attestation, that the subscription of the testator's name was made in his presence and by his express direction.

Hall & Bostwick and S. Weldy, for defendants in error.

JOHNSON, Ch. J. We will consider the several questions made in the order they arose in the case.

As to the execution of the will. It was a conceded fact that the testator did not subscribe his own name to the paper, but that it was signed for him by one Jeremiah Hall, who wrote the will at testator's instance.

Evidence was given by the attesting witnesses tending to show that such signing was done before they came into the room, and that while they were present he neither signed the paper nor acknowledged the signature to be his, nor did he acknowledge, in their presence, that such signing by Hall for him was by his express direction or in his presence.

On the other hand, the evidence tended to show that it was signed for the testator by Hall, in his presence and by his express direction, and in the presence of the witnesses, who, at his request, attested the same in his presence.

Upon these aspects of the evidence, the plaintiff in error presented two propositions to be given in charge, which were refused:

1. That if the will was signed for the testator, in the absence of the attesting witnesses, by Hall, then the fact that it was so subscribed in the testator's presence and by his express direction, must be proved by the two attesting witnesses who heard the testator acknowledge such fact, or by two witnesses.

2. If it was so signed, it is not well executed unless the testator acknowledged to each and both of the attesting witnesses that Hall had so signed for him in his presence and by his express direction. In lieu thereof, the court charged as follows:

"It is not necessary that any precise form of words should be used by the testator in acknowledging either his signature or will. It will be sufficient if, by signs, motions, conduct, or the attending circumstances, he gives the attesting witnesses to understand that he acknowledged the will and the signature to be his. If, therefore, you should find, from the evidence, that Mr. Haynes authorized Mr.

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Hall to sign his (Haynes') name to the will when no other witness was present, and Hall did so sign the will in the presence of Mr. Haynes, and afterward, on the same day, Mr. Haynes, either by words, signs, motions, conduct, or the attending circumstances, gave the attesting witnesses to understand that he acknowledged the signature, and requested them to attest the will, and that they did so attest the will in his presence, this will be a sufficient acknowledgment and attestation of the signature, and your verdict should be for the defendants and the will."

These requests, and the charge given, raise the question as to what constitutes the due subscription and acknowledgment of a will, when the attesting witnesses are not present and did not see the testator sign.

The second section of the wills act reads: "Every last will and testament (except such as is mentioned in the seventy-fourth section of this act) shall be in writing and signed at the end thereof by the party making the same, *or by some other person in his presence and by his express direction*, and shall be attested and subscribed in the presence of such party by two competent witnesses, who saw the testator subscribe, *or heard him acknowledge the same*." [Note.—In Swan & Critchfield's Statutes, the last words are, "or heard him acknowledge to same," but in the original roll and in Curwen, it reads "*the same*."]]

Counsel claim that where the witnesses did not see the testator sign, then they must have heard him acknowledge all the facts requisite to such signing, and if the will was signed for him, that the acknowledgment must embrace the fact that he expressly authorized another person to sign for him; and that a general acknowledgment that such signature was his, and that he acknowledged the paper so signed as his will, is not sufficient.

This view was rejected by the court below, and the rule as laid down in *Raudebaugh v. Shelley*, 6 Ohio St. 307, adopted.

That was the case of a testator signing himself in the absence of a witness, while this is a case of signing by another. It was there held that the testator need not in words expressly acknowledge such subscription, if by signs, motions, conduct, or attending circumstances, he gave the attesting witnesses to understand that the signature and will were his.

To the same effect is *Baskin v. Baskin*, 36 N. Y. 416, where the testator produced a paper bearing his own signature, and requested

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the witnesses to attest it as his will. It was held a sufficient acknowledgment under the New York statute, which is like our own.

Nor is this in conflict with *Chaffee v. Baptist Miss. Con.* 10 Paige, 85, much relied on in this case. That was the case of a testatrix who could not write. The will, with her name signed to it, was produced by her to the witnesses, and putting her hand on the signature she said: "I acknowledge this to be my last will and testament;" but she did not admit in the presence of the witnesses that she had subscribed her name to the will, or that it was her signature, or that it had been subscribed thereto by any other person by her direction, and there was no *other evidence* that she did so subscribe or acknowledge the signature to the will, and it was held insufficient, because merely calling the paper her will was not an acknowledgment of the signature to the will.

The distinction between these cases is, that in *Raulebaugh v. Skelley* and *Baskin v. Baskin*, the personal signature had been made, in the absence of the witnesses, an acknowledgment of the signature as his, to the witnesses, and of the paper as his will, is sufficient; while in the *Chaffee Case*, if signed by another, in the absence of the witnesses, the mere publication of the will as his, without any acknowledgment of the signature, cannot be deemed an acknowledgment of the unseen subscription made by his direction.

The subscription by the testator, either in person or by another, by his express direction, in his presence, and the publication of the same, are independent facts, each of which is essential to the due execution of the instrument, but it by no means follows, that a will must fail if the attesting witnesses did not remember all that passed at the time that it was acknowledged, or that other evidence cannot be adduced to establish the will.

In *Chaffee v. Baptist M. C.*, 10 Paige, 85 it was held: "that the facts may be implied or shown from circumstances, or the testimony of other witnesses, when the attesting witnesses fail to recollect what did occur, or even when they testify that important requirements were not complied with. *Duckwall v. Weaver*, 5 Ohio, 13; *Bennet v. Sharp*, 33 E. L. & Eq. 618.

In *Adams v. Field*, 21 Vt. 256, where the will was written by another, beginning: "I, A. B." etc., if the testator acknowledged it to be his will, in the presence of the witnesses, and desired them to attest it as such, it will be sufficient under the common-law rule that did not require the will to be signed at the end, if signed in the body

• Haynes v. Haynes.

of the paper. Here the signature in the body of the will, written by another, was held to be the testator's signature if so acknowledged by him to be his.

So in *Sarah Miles' Will*, 4 Dana, 1, where the will was drawn by a neighbor, with her name in the body of the instrument, as "I, Sarah Miles," etc., and read to and approved by her in the presence of witnesses as her will, and as such attested. She failing to sign for want of strength; it was held a sufficient signing and acknowledgment under the Kentucky statute, which, like the English statute of frauds, did not require a signing at the end of the will. We cite these cases to show that a signature by another may be sufficiently acknowledged to the attesting witnesses, without repeating to them, that the same was made by express direction. In the last case, ROBERTSON, Ch. J., says: "The fact that the testator wrote his own name cannot be material, because the statute only requires that it should be signed by himself, or by some other person with his authority; and it has been often decided that the mark of an illiterate testator, or his acknowledgment of his signature, written by another, may be a sufficient signing in the case of a will as in other analogous cases."

Whether, in the absence of all evidence tending to show that such previous signing by another, for the testator, was by his express direction and in his presence, a mere acknowledgment of the will and signature to the witnesses, would be sufficient; or whether, in case of such a signature without express authority, it could be *adopted* in the presence of the witnesses, we need not now determine, as they are abstract questions not raised by the evidence.

The fourth request, as here mentioned, embodies the point actually involved; that is, if Hall signed for the testator, in his presence, by his express direction, but in the absence of the attesting witnesses, it is not properly executed, unless the testator acknowledged to each and both of them, that Hall signed for him by his express direction and in his presence.

That is to say, that although such express authority to sign, and such signing be proved by other competent testimony, yet the will must fail, unless the acknowledgment was made *to the witnesses*, not only that the signature was his, but also acknowledge that he had, previous to such signing, expressly authorized Hall to sign for him, and that he had done so in his presence.

In this we do not concur. The *Raudebaugh Case* decides that

when the testator himself signs in the absence of the witnesses, he need not acknowledge by *words* or in any particular form, but may do so by signs, motions or conduct. The same rule applies to a signing by another in the absence of the witnesses; otherwise one who had lost the power of speech, though in possession of all his other faculties, could not acknowledge a will previously signed for him by another by his express direction and in his presence. We agree with the court below that such an acknowledgment is sufficient, if made by signs, motions, conduct or attending circumstances, and is understood as affirming the signature and will to be his.

We also agree with counsel that mere silence is not enough. The testator must, in some way, acknowledge and publish the paper as his will.

Upon a careful review of the case and the authorities, we conclude:

1. That if a will is subscribed by the testator, or for him by another, in his presence and by his express direction but in the absence of the attesting witnesses, the will, and the subscription to the same, must be acknowledged by the testator to the attesting witnesses.

2. That in making such acknowledgment it is not necessary that the testator should acknowledge to each or both of said witnesses the fact that Hall had signed for him at his request and by his express direction, if, by words or otherwise, he gave the witnesses to understand that the signature and the will were his, and then had it attested as such by the witnesses in his presence.

3. That the signing of a will is one step in its execution, and when done in the absence of the attesting witnesses, either by the testator or for him by another, the fact of such signing and the authority to sign may be shown by any competent witnesses, or by facts and circumstances which raise the presumption of such execution, as well as by the acknowledgment of the attesting witnesses.

4. That while the due execution of a will cannot be assumed in the face of positive evidence to the contrary, merely because it has been signed and attested in due form, yet mere failure of the attesting witnesses, or their denial of the facts, will not defeat it if it can be established by other evidence.

Neither failure of memory, nor the corrupt or false swearing of attesting witnesses will be allowed to defeat the will, if its due execution can be shown by other testimony. 3 Redf. on Wills, ch. 1, § 8, p. 9; *Clark v. Dunnavant*, 10 Leigh, 14; 1 Redfield on Wills,

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ch. 4, § 19, p. 22; *Dean v. Dean*, 27 Vt. 746; *Elliott v. Elliott*, 10 Allen, 357; *Lawyer v. Smith*, 8 Mich. 411; *Tilden v. Tilden*, 13 Gray, 110; *Ela v. Edwards*, 16 id. 91; *Dewey v. Dewey*, 1 Metc. 349; *Chaffee v. Bap. Miss. Con.*, 10 Paige, 85; *Adams v. Field*, 21 Vt. 256; *Bowman v. Christman*, 4 Wend. 277; 2 Phill. on Ev. 935, note; *Kirk v. Carr*, 54 Penn. St. 285.

This last was the case of a will, signed by another, and admitted to probate. It was held that the *prima facie* case of due execution could not be overcome by one of the attesting witnesses swearing that he did not recollect that the testatrix requested her name to be signed by another.

[But on a minor and technical point]

Judgment reversed, and cause remanded for new trial.

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CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

WRIGHT v. WEST.

(3 Lea, 73.)

Insanity — widow neglecting to dissent from husband's will.

A widow, in consequence of her lunacy, neglected to dissent from the provision of her husband's will within the statutory time. *Held*, that she might afterward, in equity, claim her rights in the estate as if she had duly dissented.

BILL for dower. The opinion states the facts. The complainant had judgment below.

J. J. Turner, for complainant.

J. E. & A. E. Garner, for defendants.

COOPER, J. Reuben Wright died on the 27th of May, 1869, leaving a widow, complainant, Martha Wright, and eight children by a former wife. He left a will, the only provision of which for his widow is thus worded: "I will to my wife Martha the tract of land she owned before our marriage, also the mare, and all the household furniture that she brought here, and also my buggy." At the death of the testator, and for the two preceding years, the wife, Martha Wright, was of unsound mind, and so continued until the filing of this bill on the 31st of December, 1872. The bill was filed for dower in the lands of which the husband died seized and possessed, for the

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year's allowance given by law, for a distributive share of the personality, and for the value of exempted articles, upon the ground that she was thus entitled as if she had dissented from her husband's will within the time prescribed by law. In the meantime the defendants, R. C. Wright and David West, who were appointed and had qualified as executors of the will, had sold the land and personality and distributed the proceeds, after the payment of debts and the costs of administration, to the children of the testator. They had, shortly after the testator's death, delivered to the brother-in-law of Martha Wright, who had the custody of her person, the articles of personality mentioned in the will, he giving a receipt therefor. The defendant, David West, had bought the land shortly after the testator's death, and was in possession, and he was made a defendant individually as well as in his capacity of executor.

The defendants answered the bill, and as executors, filed a cross-bill against the complainant and the children of the testator, to have contribution from the latter out of the moneys paid them for the proportional part of each in any recovery had by the complainant. They also relied, as they had previously done in a demurrer which was overruled, upon the point that the widow had not dissented from the will within twelve months from the probate of the will, as required by the Code, section 2404, and could not do so by reason of her unsoundness of mind, and was thereby barred of all claim against the will. Some stress was also laid upon an alleged ante-nuptial parol settlement between Reuben and Martha Wright, by which the latter waived all right to her husband's property. The chancellor held that the complainant was entitled to the relief sought, subject to be charged with the value of the articles delivered under the will, which it appeared went to her benefit, and the defendants to a decree over, upon their cross-bill, against the children of the testator for their proportional part of the recovery. The defendants appealed.

Any ante-nuptial contract in parol was, of course, void under our statute of frauds. Code, § 1758, sub-sec. 3; *Hackney v. Hackney*, 8 Humph. 452. The rights of the parties turn upon the question whether a widow, who has not dissented from her husband's will within the time prescribed by law because of unsoundness of mind, may in equity obtain relief "as if she had dissented."

The doctrine of election of rights grew up independent of statute, and was applied in several classes of cases. One of these classes

was that of a widow required to elect between the provisions of her husband's will and her legal rights of dower at common law. She might be put to her election at law by express words. *Goaling v. Warburton*, Cro. Eliz. 128. And in equity by manifest implication. *Birmingham v. Kirwan*, 2 Scho. & Lef. 452; *Whilder v. Whilder*, Riley Ch. 205; *Herbert v. Wren*, 7 Cr. 378; *Adsit v. Adsit*, 2 Johns Ch. 448; 7 Am. Dec. 539. But the difficulty of applying the principle of manifest implication led to uncertainty and confusion. To obviate this evil, in several of the States, statutes have been passed requiring the widow to elect, within a given time, between her husband's bounty and her legal rights. 1 Wash. on Real Prop. 272. Among these statutes was the North Carolina act of 1784, 22, 8, which continued in force in this State, with slight modifications, until brought forward into the Code, with the modifying acts, in sections 2404 and 2405. That section was, in substance, that if the husband made a will without any express provision for his wife, by giving her such part of his real or personal estate, or to some other for her use, as shall be fully satisfactory to her, such widow might signify her dissent in open court within six months after the probate of the will, and in that case shall be entitled to dower in the lands of which the husband died seized and possessed, and one-third, or a child's part of his personalty. Under this, and similar statutes, the decisions are that the right of election is personal, and must be exercised strictly as required. *Hinton v. Hinton*, 6 Ired. 224; *Harry v. Green*, 9 Humph. 182. As a necessary sequence, if the widow be incapable of acting because of lunacy, it has been held that she cannot make a valid dissent, nor, of course, can her committee, if there be a committee. *Lewis v. Lewis*, 7 Ired. 72; *Kennedy v. Johnston*, 65 Penn. St. 451; S. C., 3 Am. Rep. 650. This is in strict accord with the doctrine of election at common law, where it has been invariably held that a lunatic cannot elect. *Ashby v. Palmer*, 1 Mer. 296; *In re Wharton*, 5 De G., M. & G. Nor can an infant. *Carr v. Ellison*, 2 Bro. C. C. 56; *Van v. Barrett*, 19 Ves. 102; *Burr v. Sein*, 1 Whart. 252, 265. And neither the committee of the lunatic, nor the guardian of the infant, can elect for the ward, the election being a judicial, not a ministerial act, and belonging to the court having jurisdiction. *Turner v. Street*, 2 Rand. 404; *Ebbington v. Ebbington*, 5 Mad. 117; *Gretton v. Howard*, 1 Sw. & Est. 413. And persons thus under disability may be forced to elect at the instance of the executors or persons interested under the will. *Vane v. Lord*

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Dungannon, 2 Scho. & Lef. 118, 133; *Wilson v. Townsend*, 2 Ves. J. 696; *Robertson v. Stephens*, 1 Ired. Eq. 247; *Addison v. Bewie*, 2 Bland, 606, 623; *Taylor v. Browne*, 2 Leigh. 419. On principle it would seem clear that the same rules would apply to an election required by statute, as to an election required by the common law.

The doubt grows out of the limitation of the time within which the dissent is required by the statute to be made. In *Lewis v. Lewis*, 7 Ired. 72, and *Kennedy v. Johnston*, 65 Penn. St. 451, S. C., 3 Am. Rep. 650, in both of which the lunatic widow, by her committee, was attempting to assert a legal right upon the assumption of a valid dissent within the time prescribed, the court, while holding that neither the lunatic nor the committee could make a valid dissent, waive the consideration of the widow's equitable rights in view of the impossibility of making a valid election, with an intimation that the questions belong exclusively to the court of chancery. The point is also pretermitted expressly by this court in *Smart v. Waterhouse*, 10 Yerg. 103, because not directly raised by the facts of that case. I am unable to find any decision on the point. It seems to be entirely open. But in principle, it presents, I think, no serious difficulty.

These statutes, and notably the provisions of the Code, require an exercise of the mind by a competent person, with knowledge of the facts. The very act of election implies these requisites, and it was so held by the courts on general principle. The Code (§ 2405) expressly requires the personal representative of the estate, upon the application of the widow, to disclose the condition of the estate, to enable her to act as her interest may require. Of course, if she cannot dissent because of her want of capacity, she cannot make this application. To hold that she is deprived of her election, when she could not possibly make it, would be an unsatisfactory construction of a statute which manifestly contemplates an intelligent election. If independent of the statute, a testator were to make provision for his wife, saying, in so many words, that it was in lieu of dower, and were to require an election by her within twelve months after the probate of his will, it would scarcely be argued that the wife, if an infant or a lunatic, would be barred by the failure to elect within the time. The only object of the statute was to limit the period of the widow's election, not to change in other respects the well-settled principles of law on the subject. And although the limitation is, in some respects, analogous to the statutes of limitations, it differs from those statutes in one essential particular. A suit may be

brought at any time, and by any person, to assert the rights of an infant or a lunatic in the courts of law, whereas the election of a widow, as we have seen, cannot be made by a lunatic, nor by any person for her. Construing the statute literally, she is utterly without remedy, and if the statute be equitably interpreted, to allow an election by the court for the lunatic under a bill commenced by a committee, or next friend, within the year, the letter is departed from, and equity must equally interpose if satisfied that the lunatic had no committee, and no next friend to sue for her.

But this court has decided that the statute is not so inflexible as the literal interpretation would imply. In *Smart v. Waterhouse*, 10 Yerg. 94, it was held that a widow, who had been prevented from making her election within the year by the fraudulent conduct of those interested in the estate, might afterward assert her rights "as though she had dissented in time." And if she may thus avoid the letter of the law by reason of the strong equity of the particular circumstances, there is no insuperable difficulty in granting the same relief, upon well-established equitable principles, where the equity is stronger. There the widow might, by calling in the aid of third persons or counsel, have ascertained the facts, and made an intelligent election. Here she was incapable of electing, incapable of consulting others, without any committee, and it seems, without any friends to act for her. It is impossible to conceive of a stronger array of equitable circumstances to justify the court of chancery in now asserting her rights "as though she had dissented in time." Nor am I able to see any serious evil which can arise from the exercise of so plain an equity. The executor who is compelled to settle with a lunatic devisee or legatee, without a committee, must necessarily come into equity for protection. He would have been under the necessity of so doing before the statute, if the testator had made an express provision for his widow in lieu of dower, and she had been a lunatic. And he may clearly do so since the statute. If he and the persons taking under the will choose to act otherwise, they do so at their peril, as they would in any other case where there is an infant or lunatic devisee without guardian or committee. Mere delay, and the negligence of friends, this court has held, will not be allowed to prejudice the rights of one in no condition of mind to know or assert them. *Alston v. Boyd*, 6 Humph. 504.

There is no error in the chancellor's decree, and it is affirmed with costs. The complainant has, it seems, died since the appeal to this

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court, and the allotment of dower is no longer required. The necessary accounts can probably be taken on the evidence in the record without remanding or the cost of additional proof.

FREEMAN, J., dissented.

HENDERSON v. WAGGONER.

(3 Lea, 133.)

Contract — validity — unlawful use of money lent on note.

Where a bank discounted a note, its officers knowing that the proceeds were to be used for an unlawful purpose, but not intending to aid such purpose, the note is not invalid.*

ACTION on a note. The opinion states the facts. The plaintiff had judgment below.

D. Campbell, for defendant.

J. G. Wallace, for plaintiffs.

DEADERICK, Ch. J. It sufficiently appears from the evidence, that the note sued on in this case was executed in renewal of a note given to the Planter's Bank prior to the adoption of the ordinance of secession from the Federal Union, by the State of Tennessee.

The defense upon the trial in the Circuit Court was, that the note was discounted by the bank with the intent and for the purpose of equipping a company, to engage in acts of hostility against the United States. And the argument is, that such a purpose and design on the part of the bank rendered the note void, as being in contravention of public policy and the Constitutions and laws of the United States and of the State of Tennessee.

The verdict and judgment were in favor of defendants, and plaintiff has appealed, in error, to this court.

As before stated, we think there is sufficient evidence to sustain the verdict, if the charge of the court is correct. And plaintiff in error relies mainly for a reversal of the judgment upon the alleged errors in the judge's charge.

* See, to same effect, *Brunswick v. Valles* (50 Iowa, 120), 33 Am. Rep. 119, and note, 122.

He stated to the jury, "that mere knowledge on the part of the bank officers, that the money, for which the note was given, was to be used for unlawful purposes, would not render the contract void; but that it was necessary that the proof should show, not only that the fact was known to the bank, but that the object and intent of the bank was to aid the rebellion, or to promote the cause of the Confederate States. It must have been the object and design of the bank, in affording the loan to the defendants, to have it used in aid of the rebellion."

It is correctly argued, that this charge does not come fully up to the rule laid down in *Puryear v. McGavock*, 9 Heisk. 461.

But that opinion, I have been for some time satisfied, is subject to criticism, in not distinguishing between contracts, void for illegality of the consideration, and those void because against public policy, and consequently I think the rules laid down in the charge of the court in this case are sound, and sustained by authority. Indeed, in recent cases of high authority, the rule has been held, that mere knowledge of a vendor, that an article, innocent in itself, is to be used for an illegal or immoral purpose, makes the sale void. *Benj. on Sales*, § 506.

But this court has not adopted the rule last cited. We hold, therefore, that there was no error in the charge upon this point.

[Omitting questions of evidence.]

Upon the whole, we are of opinion that there is no error in the record, and the judgment will be affirmed.

Benstine v. State.

BENSTINE V. STATE.

(3 Lea 169.)

Criminal law — rape — evidence — acts of unchastity — complaints.

On a trial for rape, the defendant may prove, by the complainant or others, particular acts of unchastity on the part of the complainant.*

On a trial for rape, witnesses may prove the details of complaints of the complainant about the time of the offense.†

CONVICTION of rape. The opinion states the facts.

L. B. Horrigan and L. E. Wright, for defendant.

Attorney-General Lea, for State.

McFARLAND, J. The prisoner has been convicted in the Criminal Court of Shelby county, of the crime of rape upon Annie Dugan. The jury decline to commute the punishment. A new trial was moved for and refused, and the judgment of death pronounced, from which the prisoner has appealed in error.

The age of Annie Dugan is not shown, but from various circumstances appearing in the record, it is clearly to be inferred that she was quite young. She had been an inmate of an orphan asylum, and from thence came to the house of the defendant in the city of Memphis, and remained there as a servant some fourteen months, and until the commission of the alleged rape on the 22d of May, 1877.

The prisoner, as he stated to the jury below, is a German, fifty-seven years of age, and as we gather from the record, was a merchant.

The substance of Annie Dugan's testimony, without going into detail, is, that on the morning of the 22d of May, 1877, about daylight, the prisoner came to her bed and got into the bed before she awoke; that she cried and begged him to go away, but he struck her one or more blows in the side, and compelled her through fear to keep quiet, and then forcibly had carnal knowledge of her. She states that the bed of the prisoner, in which his wife then was sleep-

* To same effect, *Woods v. People* (55 N. Y. 515), 14 Am. Rep. 309, and note, 311.

† To same effect, *State v. Kinney*, 44 Conn. 153, 20 Am. Rep. 436.

ing, was in an adjoining room only a few feet from her bed (as shown by other testimony, only about nine feet), the rooms being connected by a glass door. Another family were sleeping in within some nine feet of her bed, separated, however, by a thin plank partition. She says her failure to make an outcry was through fear. She states that she told the prisoner's wife of the occurrence early next morning. who replied that she was sick, and could not be "bothered" about it. She left the prisoner's home the same morning, going to the house of Mrs. Schwab, where her sister lived, and told Mrs. Schwab her complaint, and substantially the details of the occurrence. A physician was at once called, who proves that he made an examination, and found the female organs swollen and inflamed, and from this and other particulars which he details, gives it as his opinion that some male person had recently before had sexual intercourse with her.

Mrs. Schwab was called, and corroborated Annie Dugan, as to the fact of the complaint made to her and the particulars thereof.

This was the case for the State.

The defendant's counsel sought by cross-examination and other testimony to break the force of the testimony of the principal witness for the State, without avail in the court below.

Several questions have been presented as grounds for reversal and argued with great earnestness and ability, the most important of which we notice first.

On cross-examination, Annie Dugan was asked if anyone ever had sexual intercourse with her previous to the time of the alleged rape, and she replied in the negative.

Edward DeVere, a witness for the defendant, was asked by defendant's counsel if he had observed Annie Dugan do any indecent act, or if he knew of anything done by her not virtuous in its character. An objection of the Attorney-General to this question was sustained, and thereupon the defendant's counsel stated to the court what they proposed to prove by this witness and other witnesses then in court, and desired to ask witness if he knew of any acts of indecency and illicit intercourse upon the part of Annie Dugan with persons other than the defendant, said acts being during the time DeVere was boarding at the prisoner's house, and between that time and the alleged rape. This embraces a period of some months recently before the alleged rape.

The court sustained the objection, ruling that no specific acts of

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indecenty or illicit intercourse with other persons could be shown by the defendant, but that he might if he chose attack her general character for chastity. To this ruling the defendant excepted.

It is argued by the Attorney-General that the question as to the admissibility of the proposed testimony was not fairly made, inasmuch as the question actually propounded to the witness was not as to the illicit intercourse, but only as to acts of indecenty, and that the question as to previous illicit intercourse was not actually propounded to the witness. But we must take the proposition of the defendant's counsel to have been made in good faith, and as the court distinctly ruled that no previous acts of illicit intercourse could be proven, it was not necessary to formally propound the question to the witness.

The question presented is one upon which there is conflict of authority. The ancient rule was in accordance with the holding of the judge below. The rule is so laid down by Mr. Greenleaf, vol. 3, § 214, probably, as has been said, derived from the English cases of *Rex v. Hodgson* and *Rex v. Aspinwall*, and it has been followed in many instances. But these authorities were reviewed by Mr. Justice COWEN, in *People v. Abbott*, 19 Wend. 194, and a different rule established, to wit, that previous intercourse with other persons may be shown, as bearing directly upon one of the principal questions at issue, that is, whether the intercourse was by force or with consent of the injured female ; and this for the reason that no impartial mind can resist the conclusion that a female who had been in the recent habit of illicit intercourse with others will not be so likely to resist as one who is spotless and pure.

This court, at its April term, 1874, at this place, in the case of *Titus v. State*, took this view of the question, and Judge FREEMAN, delivering the opinion, adopted the language of Mr. Justice COWEN in the above-named case.

In the *Titus case* the injured female was asked upon cross-examination, whether she had recently before had sexual intercourse with any other person than the defendant. The question was objected to and the objection sustained, and for this error the judgment was reversed.

The only distinction between that case and the present is, that in the present case the question was asked the witness Annie Dugan, and answered in the negative, and the question here is, whether the facts may be proved by other witnesses. If the previous illicit inter-

course between the injured female and other persons be regarded as facts collateral to the main issue, then it might be legitimate to propound these questions to the female herself, under the latitude allowed in cross-examination for the purpose of testing the credibility of the witness, and yet it might not be legitimate to prove the intercourse by other witnesses, as in that view her answer upon collateral questions would be conclusive; but it is manifest from the cases referred to, that this is not regarded as a mere cross-examination of the witness as to the collateral facts, but it is regarded as testimony as to the facts bearing directly upon the issue.

The authorities all agree that the want of chastity of the injured female is material. The difference is, that one class of authorities hold that this want of chastity can only be shown by proof of her general bad character in that respect, while the others hold that particular acts may be proven.

If the facts sought to be proven either upon the cross-examination of the injured female or by other witnesses are such as do not bear upon the issue, but tend only to disgrace the female, the testimony ought to be rejected, and it may be a matter of doubt whether a previous act or acts of illicit intercourse upon the part of the injured female, committed at a remote period of her life ought to be admitted inasmuch as such facts might be true, and yet her subsequent life may have fully established her claim to virtue. In such case, to disclose the previous acts might tend only to expose her to disgrace, without throwing any material light upon the issue involved. But while the injured female ought to be protected as far as possible from disgrace, on the other hand these considerations ought not to exclude evidence bearing directly upon the issue, for defendant's rights ought to be equally protected. The crime of rape is one hard to disprove, and experience has shown that where the charge rests upon the testimony of the injured female alone, there is sometimes danger of unjust conviction, and defendants ought not to be unjustly exposed to this danger from fear of exposing the injured female to disgrace.

To the position that the character of the injured female may be proven, it may be replied that her previous acts of illicit intercourse may be unknown to the public, and her general reputation may be good, and yet her total want of virtue may be shown by proving the facts which, if known, would totally destroy her character. In the *Titus* case the character of the prosecutrix was shown. It appeared

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that she was a prostitute, yet this was held not to be sufficient to deprive the defendant of the right to prove particular acts of illicit intercourse. These facts are material, as they bear upon the question of consent, and may in some cases tend to explain or account for the condition of the injured female immediately after the alleged rape, and it may also bear upon the credibility of the principal witness.

This view of law is supported by the case of *People v. Benson*, 6 Cal. 221, and to some extent by the case of *Shirwin v. State*, 69 Ill. 55. It is true that in these cases, as in the case of Titus, there were strong circumstances against the truth of the charge, but we do not see that this changes the principle.

As the judgment must for this reason be reversed, it is unnecessary to notice the other questions, except such as are likely to again arise upon another trial.

The point was made in the court below that Annie Dugan should not have been allowed to give the *details* of the complaint which she made to Mrs. Schwab, and that Mrs. Schwab should not have been allowed to prove the details of the complaint, the position being that these witnesses should only have been allowed to prove the *facts* that complaint was made, but not the details thereof.

The question was directly decided in the case of *Phillips v. State*, 9 Humph. 246, and there was no error in overruling the objection.

The criticisms upon the charge, we think, are not substantial.

We have been strongly urged by the prisoner's counsel to express our opinion upon the facts. This, however, we decline to do. The charge is one of grave and serious import, and must be plainly submitted to a jury, when all legitimate evidence has been heard.

Let the judgment be reversed and a new trial awarded.

SANDERS v. MARTIN.

(3 Lea, 212.)

Party wall — contribution.

One owner of a party wall, who adds to it for his own use, may maintain an action of contribution against the other owner who has used such additions for one-half the value of the additions when made.*

ACTION of contribution for a party wall. The opinion states the case. The plaintiff had judgment below.

McFarland & Goodwin, for complainant.

Metcalf & Walker and *W. M. Randolph*, for defendants.

COOPER, J. Both defendants demurred to the complainant's bill. The demurrer of the defendant, Martin, was overruled, and she appealed. The demurrer of the defendant, Smalzreid, was sustained, and the complainant appealed. The complainant and defendant, Martin, own adjoining lots in the city of Memphis, each fronting twenty-five and running back 100 feet, on which buildings have been erected for more than twenty years, with a party wall between them half on the land of one and half on the land of the other. The houses were two stories high, without any cellar. In the latter part of the year 1867, complainant erected a three story brick house on his lot, using the party wall and raising it one story higher. He also, with the consent of the defendant, Martin, dug a cellar to his house, which necessitated underpinning the party wall by a wall of the same thickness, one-half on his lot and the other half on the lot of defendant, Martin. Complainant expected that when defendant came to use the cellar and raise her house higher, she would contribute one-half the actual cost of these improvements. "Such has been," he says, "the universal custom as to party walls and owners of adjoining lots for a long period of time in Memphis, until it has grown to be a custom in its full technical sense." In the year 1872, the bill being filed on the 5th of February, 1873, the defendant, Martin, by her tenant, Smalzreid, had erected a four story brick house on her

* See *Richardson v. Tobey* (121 Mass. 457), 23 Am. Rep. 262.

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lot, digging out the cellar and raising the party wall higher than it was before, using the whole of the party wall, both below and above ground, and they are both now in the use and enjoyment of said wall.

Complainant is informed that defendant, Smalzreid, has a lease from defendant, Martin, and has, perhaps, dug the cellar and built the house. Complainant does not know whether or not there is any stipulation in the contract of lease, determining which of them should account for the half of the wall so used, and he calls for a discovery as to this matter.

Complainant asks for a decree against one or both defendants for a proportionate contribution to the expense of the additions to the party wall made by him and used by defendants.

The case made by the bill is, in substance, that the complainant, owning a lot in Memphis, and having the right of easement in a party wall resting one-half on the adjoining lot, by a user of twenty years, extended the wall above and below for his own convenience, with the consent of the owner of the adjoining lot, and now seeks contribution from such owner who used the extension by improvements on his lot.

The common law is singularly obscure on this subject, and the decisions few, conflicting and unsatisfactory. It seems certain that the common law does not recognize the right of the owner of land to compel the owner of an adjoining lot to build a party wall, nor can either demand contribution from the other for a wall erected, in whole or in part, on the land of such other person, nor for any incidental benefit the latter may derive from a wall erected entirely on the land of the builder. *Sherred v. Cisco*, 4 Sandf. 480; *Orman v. Day*, 5 Fla. 385; *Abraham v. Krautler*, 24 Mo. 69. If the two adjoining owners build a wall partly on each lot, and by agreement or by continuous use for twenty years treat it as a party wall, each has an easement of support for his half. *Webster v. Stephens*, 5 Duer, 558.

In England, after long use, the presumption is that the land on which the wall stands belongs to the adjoining owners in moieties as tenants in common, but the presumption may be rebutted by showing the actual ownership of each. *Whitshire v. Sidford*, 8 B. & C. 259, note; *Cubitt v. Porter*, id. 257. The inclination of the American courts, it is said, is to treat the parties as owners in severalty. *Sherred v. Cisco*, 4 Sandf. 480. This is the case made by the bill. In such case each owner acquires an easement of support by the

party wall, so long as it stands, which the other may not weaken or destroy. *Brown v. Windson*, 1 Crompt. & J. 20; *Partridge v. Gilbert*, 15 N. Y. 601. If the wall become ruinous or unsafe, the weight of authority is that one may rebuild, and compel the other to contribute. *Campbell v. Mesier*, 4 Johns. Ch. 334; *Partridge v. Gilbert*, 3 Duer, 184; *S. C.*, 15 N. Y. 601; *Brooks v. Carter*, 50 id. 639; *S. C.*, 10 Am. Rep. 545. If the wall is destroyed by fire, the rule seems to be otherwise. *Sherred v. Cisco*, and *Orman v. Day*, *supra*. Unless the two proprietors build at the same time, in which case it has been held that the one who builds the party wall may recover from the other a moiety of the costs. *Huck v. Flentye*, 80 Ill. 258.

Each owner of a party wall may carry up or underpin the wall, certainly with the consent of the other owner, but at his own expense. *Campbell v. Mesier*, 4 Johns. Ch. 334; *Eno v. Del Vecchio*, 4 Duer, and 6 Duer, 17; *Bradbee v. Christ's Hospital*, 4 M. & G 714, 761; *Matts v. Hawkins*, 5 Taunt. 20.

The authorities stop short of the case before us, and that is whether, after the wall has been underpinned and raised in height by one for his own convenience, he can claim contribution from the co-owner when the latter actually uses these additions. In the forum of conscience, the answer would at once be that the latter ought to pay the former for the benefit received by his labor and expenditure. The argument of the learned counsel for the defendants is, that this court is governed by the law, not by principles of abstract right; that the defendant owns the soil to the center of the earth, with the right to build thereon *ad libitum*; that the defendant is entitled to treat any erection made by a third party on his own land as his own, and in fine, that the client stands upon the letter of the law, and claims all he can get. Undoubtedly courts of justice administer the law, not the rules of moral duty, though fortunately the two often go together in a court of equity. If one owner can rebuild a party wall which has become dangerous, and compel contribution, it is clearly upon the equitable and moral principle that the expenditure is for the benefit of both, and that the right of easement is a sufficient basis upon which to justify interference and raise an implied contract. The same basis exists where a wall is added to and actually used. If both of these parties had dug their cellars and added an additional story to their houses at the same time, although only one of them built the addition to the party wall, a promise by the other

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to pay for a moiety of the wall would be implied; as was expressly held in *Huck v. Flentye*, 80 Ill. 258. Is there any reason in law why the same implied promise would not arise where, after the addition had been made by one, the wall was used by the other? The relation of the parties created by the joint easement in the common wall would seem to be as efficient in the case of an addition to the wall, as in the case of rebuilding the same wall. And there is no authority to the contrary. It has been held that one owner was entitled to such contribution from an adjoining proprietor where, after a parol contract, void by the statute of frauds, had been entered into between them for the erection of a common wall, the latter refused to proceed, and the former completed the erection. *Rindge v. Baker*, 57 N. Y. 209; S. C., 15 Am. Rep. 475.

The language of REYNOLDS, Ch. J., in that case, p. 224, is very much to the point. "Another objection," he says, "is made against the propriety of the judgment of the Supreme Court in this case, that there is no precedent for it, and that it is the very first of the kind known to the law. While I do not quite agree to the fact as alleged, I am yet willing to assume that there is no case reported in the books which affords an exact precedent for the judgment I am prepared to give. Where precedents are reasonable, they furnish a safe guide to follow; and where they are unreasonable, as it is not uncommon, a delicate and difficult question is often presented. But where there are no precedents that appear to be binding upon the conscience of a court, the demands of justice require, that in a proper case, one should be made. It is possible that a case precisely like this has never before arisen, but if any shall hereafter arise it may as well be understood that the party is not without an adequate remedy in the courts."

Upon the case made in the bill, if established by the testimony, the complainant is entitled to relief. The measure of relief, however, is not the cost of the additions to the wall, but the moiety of the value of the additions at the time they were actually used by the defendants. They might never have been used, in which case no contribution whatever could be had. They might have been erected when the work was, for some reason, exceptionally costly, and used when the work could have been done at half price, or when the wall itself had become dilapidated by time. The defendant cannot be called upon to pay more than half the value of the wall when used.

[Omitting a point as to a tenant.]

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The decree of the chancellor will be affirmed as to defendant Martin, and reversed as to the defendant Smalzreid. The defendants will pay the costs of this court.

Cause remanded.

ROBERTSON V. STATE.

(3 Lea, 200.)

Criminal law — homicide — by negligent use of pistol.

Where the prisoner, in sport and without criminal design, aimed a pistol at another, both supposing it to be unloaded, and the prisoner pulled the trigger, whereby the pistol was discharged and the other was killed, *held*, no crime. (*See note, p. 606.*)

CONVICTION of voluntary manslaughter. The opinion states the facts.

Richardson & Watkins, for defendant.

Attorney-General Lea, for the State.

COOPER, J. The plaintiff in error was indicted for the murder of Anderson Fowlkes on the 14th of July, 1877. He has been thrice tried and convicted, under this indictment, of voluntary manslaughter, being acquitted on the first trial of the higher grades of homicide.

The first two verdicts were set aside by the presiding judge, on the motion of the defendant below, and a new trial awarded. Judgment having been rendered on the last verdict, the prisoner appealed in error.

The defendant, the deceased, Andrew Harris and his wife Betsey, and George Harris, all persons of color, were in the employ of one Bright Harris, in threshing wheat. On the evening of the fourteenth of July they were directed by Bright Harris, who had occasion to leave home, to "empty up" the wheat. They were at the house of Andrew Harris in the evening between 8 and 9 o'clock, and the prisoner got a case-knife, and said he would cut the strings of the bags if the other men would empty up the wheat. Thereupon a playful altercation arose as to which of them should play the boss,

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while the others did the work. Andrew Harris got the pistol of Bright Harris, which was under the pillow of the bed, and flourished it about for several minutes. Then he surrendered it to the prisoner, who said he would be boss, but the pistol was put back under the pillow. Then the other three negroes took the prisoner and held him down in play, while Andrew Harris spanked him with a little piece of plank. The prisoner complained that the deceased hurt his mouth, and was then allowed to get up. He went to the bed took the pistol and came with it first to Andrew and asked him what he had hit him for. Upon his reply that he had not hit him, he went to George and asked the same question, receiving the same reply. He then went to the deceased with the same question, who returned the like answer, to which the defendant replied, yes, you did, and I am going to shoot you, pulled the trigger and the pistol went off, the ball passing into the head of the deceased over the eye, and causing his death about daylight the next morning.

All the witnesses agree in saying that during the scene Betsey, the wife of Andrew, had told the others not to be afraid, that the pistol was not loaded.

They further agree that they were all in fun, and Betsey, in her testimony, says she thought so until the shot was fired. George's testimony is similar in effect, for he states nothing that would indicate the contrary.

Andrew and his wife both say that when the defendant complained that the deceased hurt his mouth, it was with an oath, and Andrew adds that he did not think the defendant was mad until he said that.

Upon this state of facts, taking the testimony of the only three witnesses present and duly weighing it, the conclusion would be irresistible that no crime at all was committed.

The witnesses concede that the prisoner knew who struck him, when he was down, and there is nothing to indicate that the prisoner was hurt by the deceased, or that the complaint about his mouth was anything more than a ruse to obtain his release. The use of the pistol was a repetition of the previous play, and pulling the trigger a part of the pantomime, brought about by the assurances of Betsey that the pistol was not loaded.

But Andrew says, that after his wife told the defendant that the pistol was not loaded, the defendant took it to the light on the mantel-piece to examine it, and said, yes, by God, there is one load in it.

George deposes to the same fact, except that there was only one light in the room and that it was held by Betsey. Betsey herself says she held no light in her hand, nor does she testify to the fact stated by the other witnesses, that the defendant held the pistol to the light and said that there was one ball in it.

The defendant and the deceased lived together, and there is no evidence of any enmity between them.

Under these circumstances, it is not absolutely certain that the incident, thus differently deposed to by two of the witnesses and not seen or heard by the other, ever took place; and even if it did, it may have been merely a part of the defendant's acting. When the wife said don't be afraid, the pistol is not loaded, the defendant may have held the pistol toward his eyes and remarked, not as a fact which he thus ascertained, but to make pretense, there is one load in it.

A conviction for voluntary manslaughter has been held bad by this court, where the facts set out in the bill of exceptions left it doubtful whether the act from which the death resulted was accidental or designed. *Anderson v. State*, 3 Heisk. 86.

The court charged the jury: "If you find that the prisoner and deceased, with others, were engaged in a frolic, and were using the pistol in their sport, and that they all believed the pistol was empty; and if the prisoner honestly so believed, and merely in sport presented the pistol, and it went off without negligence on his part, and no wrong and no harm was intended by the prisoner; if you find this to be true, then the defendant should be acquitted, if you find that the prisoner was guilty of no negligence in using the pistol; but if negligence existed, you should not acquit."

Again he says: "If you find from the testimony that the prisoner and the deceased were in the same room together, and that the prisoner had a pistol which he did not know or believe was loaded, but was in fact loaded, and presented the pistol at the deceased, the deceased not knowing the pistol was empty, in a threatening and negligent and careless manner, and indicating by words and by his manner that he was intending to shoot him, and did in fact fire it and killed the deceased, it would not be a chance medley or homicide by misadventure, but would be a case of voluntary or involuntary manslaughter. For a negligent and careless use of a pistol, if proven, would be unlawful or an unlawful act."

Again he says: "If you find from the testimony that the prisoner

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took the pistol, believing it was empty, and presented it at the deceased, near to the deceased, who did not know it was loaded, in a threatening manner, and in a careless and negligent manner, and indicating by words and acts at the time that he intended to kill the deceased, and did in fact fire it and kill him, without intending to do so, then, in such event, the prisoner would be guilty of involuntary manslaughter. Such a use of a loaded pistol, if proven, would be an unlawful act, whether the prisoner knew or believed it to be loaded or not."

The statute defines involuntary manslaughter to be the unlawful killing of another, without malice, in the commission of an unlawful act. Code, § 4603.

And the burden of the charge is, that the negligent use of a loaded pistol by a person who believed it to be empty, and without any intent to do harm, would be an unlawful act, and thereby turn an accident into a crime. In this there was error. Negligence in the performance of a lawful act, and *a fortiori*, negligence in sport, may indeed make the act unlawful, if the person see danger probably arising therefrom to others and yet persists. See *Lee v. State*, 1 Col. 62. But the careless use of a dangerous article or instrument in ignorance or with a laudable purpose, is not necessarily unlawful. *Ann v. State*, 11 Humph. 159. Mere negligence, not only with no intent to do harm, but under the belief that no harm was possible, is clearly wanting in every essential element of crime.

The judgment must be reversed, and the cause remanded for a new trial.

It is proper to add, in justice to the learned circuit judge whose instructions were probably based on that idea, that if the act of the prisoner had been done under such circumstances as to have amounted to an assault on the deceased, then it would have been an unlawful act, and rendered him guilty of manslaughter.

Thus if the defendant had in a threatening manner, and intending to frighten the deceased, presented a pistol, purporting to be loaded, at him, the latter not knowing or believing it to be empty, it would have been an assault, and this, perhaps, even if the prisoner supposed that the pistol was unloaded. *State v. Smith*, 2 Humph. 457. It would be otherwise if the act was without any real intention to frighten, both parties knowing it to be in fun and believing the pistol to be unloaded.

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NOTE BY THE REPORTER. — The liability of a person for homicide unintentionally committed in the perpetration of a practical joke has been several times adjudged. Thus, in *Fenton's Case*, 1 Lewin C. C. 179, where the prisoners, in sport, threw heavy stones into a mine, breaking a scaffold, which fell against and upset a corf, in which a miner was descending into the mine, whereby he was killed, they were held guilty of manslaughter. **TINDAL**, Ch. J., said: "In the present instance the act was one of mere wantonness and sport, but still the act was wrongful, it was a trespass. The only question, therefore, is, whether the death of the party is to be fairly and reasonably considered as a consequence of such wrongful act; if it followed from such wrongful act, as an effect from a cause, the offense is manslaughter; if it is altogether unconnected with it, it is accidental death." The prisoners were sentenced to three months' imprisonment. In *Rex v. Powell*, 7 C. & P. 641, a lad, as a frolic, without any intent to harm anyone, took the trap-stick out of the front part of a cart, in consequence of which it was upset, and the carman who was in it, loading it, was pitched backward on the stones and killed. *Held*, manslaughter. The prisoner was fined one shilling and discharged. In *Whittington's Case*, 2 Lewin C. C. 217, the prisoners covered and surrounded a drunken man with straw, and threw a shovel of hot cinders upon his belly, whereby he was burned to death. **PATERSON**, J., charged that "if they believed the prisoners really intended to do any serious injury to the deceased, though not to kill him, it was murder; but if they believed their intention to have been only to frighten him in sport, it was manslaughter." Verdict, manslaughter. In *State v. Roane*, 2 Dev. 58, the defendant carelessly discharged a gun, intending only to frighten a supposed trespasser, really the servant of the prisoner, but killing him. *Held*, manslaughter. This case, although cited by Wharton under "practical jokes," does not answer that description; as also is the case cited in 1 East P. C. 286, where the prisoner ducked a thief, who had picked his pocket, and accidentally drowned him. In *Rex v. Martin*, 3 C. & P. 211, the prisoner ordered a quartern of gin to drink, and asked a child present if he would have a drop, at the same time putting the glass to the child's mouth, whereupon the child snatched the glass and drank the whole contents, which caused his death. **VAUGHAN**, B., said, as this was the act of the child, there must be an acquittal, "but if it had appeared that the prisoner had willingly given a child of this tender age a quartern of gin, out of a sort of brutal fun, and had thereby caused its death, I should, most decidedly, have held that to be manslaughter." Giving one physic, in sport, if fatal, is manslaughter. 1 East P. C. 264. So, if one in shooting at another's fowls, in mere wanton sport, kills a human being. *Id.* 255.

In *Rex v. Conrahy*, 2 Crawf. & Dix, 86, the prisoner and the deceased had been piling turf together, and the former, in sport, threw a piece of turf at the latter, hitting and killing him. *Held*, no crime. In *Rex v. Waters*, 6 C. & P. 328, there was testimony that the prisoner, in the course of rough and drunken joking, pushed a boat with his foot, whereby the deceased fell overboard and was drowned. There was also testimony that the push was given by another person. **PARK**, J., said, "if the case had rested on the evidence of the first witness it would not have amounted to manslaughter," and there must be an acquittal.

Lee v. State, 1 Col. 62, cited in the principal case, was a case of killing by careless driving. "a criminal want of caution and circumspection." This is distinguishable from the principal case, because the driver must have known he was committing a careless act and it was inevitably careless. In *State v. Smith*, 2 Humph. 457, it was held that an indictment for assault by threatening with a pistol need not allege that the pistol was loaded. In *Ans v. State*, 11 Humph. 158, an indictment of a nurse for murder of an infant by administering laudanum, a charge that if the drug was administered to produce unnecessary sleep, and contrary to expectation it produced death, this would be murder, was held erroneous.

The remark in the latter part of the opinion in the principal case, that if the killing had occurred in an attempt merely to frighten, it would have been manslaughter, is supported by *State v. Hardie*, 47 Iowa, 647; *S. C.*, 29 Am. Rep. 496.

Muse v. Swayne.

MUSE V. SWAYNE.

(2 Lea, 251.)

Damages—measure of—penalty.

A shop-keeper sold out his stock, and bound himself in a penalty of \$500 not to engage in that business again in the same place for ten months, nor rent his house for that purpose, during that time. On a breach of this agreement, held, that the measure of damages was \$500.*

ACTION on a bond. The opinion states the case. The plaintiff had judgment below.

I. R. & S. W. Hawkins, for defendant.

M. D. Cardwell and *W. S. Stephens*, for plaintiff.

McFARLAND, J. Muse sold out to Swayne his stock of liquors, etc., in the town of McKenzie, and agreed not to engage in the business himself, nor rent his house for the purpose, for ten months. He violated this agreement, and this action is upon his bond, and the question is, whether Swayne is entitled to recover the amount specified as the penalty of the bond, or only such damages as he actually sustained.

The bond is substantially as follows: "I, George W. Muse, for the consideration of eight hundred dollars, am held and firmly bound to C. R. Swayne, in the penal sum of five hundred dollars, to be void on condition the said Muse shall not to his own account sell, vend or deal in whiskeys or such articles as are usually kept in a tippling-house, in the town of McKenzie, for a space of ten months. Nor shall said Muse rent or lease his grocery-house in the town of McKenzie, known as the 'Farmer's Exchange,' for the purposes of a saloon, or permit the same to be so used for a like term."

Whether the sum specified in such case shall be treated as liquidated damages, or as a penalty to secure actual damages, depends upon the intention of the parties, to be gathered from the bond and the nature of the transaction, and in all doubtful cases it is to be

* See note, 20 Am. Rep. 28.

regarded as a penalty. The fact that the sum is specified in the bond as "liquidated damages or as a penalty," is to be considered, but is not conclusive either way.

The controlling consideration in a case like this, seems to be, that it would be difficult, if not impossible, to ascertain the damages actually sustained by the plaintiff, by reason of the defendant's violation of the terms of the obligation.

What damage the plaintiff suffered by the defendant's again entering into business in the town of McKenzie, or renting his house for the purpose, within ten months, would be a question in the highest degree speculative and uncertain; so that the sum specified in the bond must be regarded as the damages, when not unconscionable and unreasonable in itself, as otherwise no measure of recovery could be fixed upon.

Such seems to be the result of the authorities, English and American, as collected by Mr. Field, in his work on the Law of Damages, sections 142 and 143. Section 155, an English case cited by the author, is precisely parallel. Where the defendant contracted not to practice as a surgeon or apothecary within seven miles of a certain place under a penalty of £500, the sum was held to be liquidated damages, for the reason already indicated.

Another consideration is, that the bond specified only two alternatives; that is, not to engage in the business or rent his house for the purpose, or pay the \$500. There is no stipulation that he may, in case he violate the agreement, pay the damages sustained, in discharge of the penalty of his bond.

We are not aware of any decision of this court that has been adverse to this view.

It does not seem unreasonable or unconscionable to allow the plaintiff to recover the full sum in this case. According to the proof, he gave the defendant \$800 for a stock of liquors worth a little more than half the sum, with the stipulations referred to, which were violated in both particulars very soon afterwards.

Judgment affirmed.

Taylor v. French.

TAYLOR V. FRENCH.

(3 Lea, 307.)

Negotiable instruments — evidence to vary indorser's liability.

As between the immediate parties to a note, evidence is admissible to show an agreement at the time of execution that the liability of an apparent indorser should be only that of a surety, guarantor or co-maker.*

ACTION on notes. The opinion states the case. The defendant had judgment below.

Greer & Adams and McKisick & Turley, for plaintiff.

H. Craft, Estes & Ellett and E. J. & J. C. Read, for defendants.

COOPER, J. The mother of the plaintiffs, then infants, loaned \$12,000 of their funds to Partee & Harbert, a firm composed of C. C. Partee and B. F. Harbert, taking therefor two notes of the firm, dated June 1st, 1870, payable twelve months after date, to Jno. Harbert and H. Partee, indorsed by them severally, and by James H. French.

The two notes were alike, except that the name of H. Partee preceded the name of John Harbert in the body and on the back of one of them. The money was paid to B. F. Harbert. The notes were not presented for payment at maturity, nor were the indorsers notified of their dishonor. The firm paid interest at the end of the first year. This suit was brought on the 15th April, 1872, against all parties to the paper.

Pending the suit Partee & Harbert received a discharge in bankruptcy, and their plea to that effect was admitted and allowed. The suit abated as to H. Partee, by his death.

The remaining defendants, John Harbert and James H. French, demurred to the plaintiff's declaration, and the demurrer was sustained as to all the counts except two. Issue was joined on these

* To same effect, *Cole v. Smith* (20 La. Ann. 551), 29 Am. Rep. 343.

counts, and a trial had, resulting in a verdict and judgment for the defendants, and the plaintiff appealed in error.

The second and third counts of the declaration sought a recovery against the defendants simply as indorsers, without averring demand and notice, and were clearly bad. The fifth count was for money loaned and advanced, and the eighth count averred an extension of the time of payment for one year after the maturity of the note, with the knowledge and consent of the indorsers.

The trial was on the fifth and eighth counts. The other counts, after making profert of the notes showing that the indorsements were in blank, averred that the indorsers had agreed to be bound, at the inception of the paper, as sureties, guarantees or comakers.

The learned circuit judge was of the opinion that parol evidence was inadmissible to show a different obligation on the part of the indorsers at the execution and delivery of the paper, from which the law would imply from the indorsements.

The point for consideration, and which has been argued with marked ability, is the admissibility of parol evidence to show the real contract as averred in the declaration. The general rule that parol evidence is not admissible to contradict or vary terms of a written instrument, applies to promissory notes, as has been repeatedly held by this court. *Campbell v. Upshaw*, 7 Humph. 185; *Hancock v. Edwards*, 7 id. 349; *Blackmore v. Wood*, 3 Sneed, 470; *Ellis v. Hamilton*, 4 id. 512.* The rule also, perhaps, applies to regular indorsements, as against a *bona fide* holder for value before maturity.† And some courts have applied it even between the immediate parties. *Lake v. Stetson*, 13 Gray, 310, note. The tendency of recent decisions seems to be in that direction, upon the ground that the contract is as fully expressed by the simple indorsement as if written out in full over the signature. 1 Dan. Neg. Instr., § 717. The rule is clearly otherwise when the indorsements are irregular, as, for example, when the indorser puts his name on the paper before the payee, or for the benefit of the payee. Id., § 710; *Rivers v. Thomas*, 1 Lea, 649. And many courts allow parol evidence in all cases of blank indorsements, because the right to demand and notice arises by implication of law, and may be waived directly or indirectly by conduct and circumstances. *Dick v. Martin*, 7 Humph. 263; *Ross v. Espy*, 66 Penn. St. 487; *S. C.*, 5 Am. Rep. 394; *Davis v. Morgan*, 64 N. C. 381;

* To same effect, *Rodney v. Wilson* (67 Mo. 123), 29 Am. Rep. 499. REP.

† To same effect, *Hill v. Shields*, ante, 499. REP.

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Johnson v. Martinus, 4 Halst. 144; *Cartrigue v. Battigieg Moore*, P. C. C. 94.

The authorities are generally agreed that the statute of frauds has no application to contracts within the law merchant, or that an indorsement in blank is sufficient to satisfy the statute, the signature applying to the contract already written in the instrument indorsed, or to the words above the signature which are afterward written by express or implied authority. 2 Dan. Neg. Inst., § 1765.

This court has uniformly held that parol evidence is admissible between the immediate parties, to show the real contract of the indorser, even in the case of regular indorsements. Thus parol evidence has been declared admissible to show a waiver of demand and notice. *Kimbroe v. Lamb*, 3 Humph. 17; *Dick v. Martin*, 7 id. 263. So, to prove that the indorser guaranteed the payment of the note. *Hall v. Rodgers*, id. 536. And to show an absolute undertaking on the part of the indorser, provided the proof was clear and satisfactory. *Newell v. Williams*, 5 Sneed, 209. "There is no question," says Judge McKINNEY, "but that an indorser in blank may, by his agreement, enlarge or vary the liability created by law. As in the case of an indorsement in full, it may be general or restrictive, qualified, conditional or absolute. Nor is there any doubt as to the right of the holder to fill up the blank indorsement in conformity to the agreement of the parties; and such agreement is to be interpreted so as to carry into effect their true intention; neither is there any doubt that if the indorsement remain in blank, or only partially filled up the holder may on the trial, show by parol evidence the nature and extent of the undertaking of the indorser." *Brookway v. Comparree*, 11 Humph. 360.

The court below erred in sustaining the demurrer to any except the second and third counts of the declaration.

The judgment must be reversed, the demurrer overruled in accordance with this opinion, and the case remanded for further proceedings.

ANDERSON V. HAMMOND.

(3 Lea, 281.)

Will — precatory words — annuity — death of legatee.

A testator provided for his wife and made her residuary legatee, adding, that was his "will and desire" that she should pay his nephew \$200 annually, commencing at a specified date, until he came of age, "for the purpose of educating him." The nephew died over two years from that date, but before his majority. *Held*, that the legacy was a personal charge on the wife, but ceased with the death of the legatee.

L. B. McFarland and *J. W. Clapp*, for complainant.

L. W. Finlay, *W. M. Randolph* and *T. B. Micou*, for defendants.

COOPER, J. By his will John Randolph made his wife Statira his residuary legatee, and also directed certain funds to be invested in a plantation for her sole use for life, and at her death to be sold, one-half the proceeds to go to the heirs of his sister, Sarah Lyell, and the other half to be at the disposal of his wife. "It is further my will and desire," he says, "that my beloved wife, Statira, shall pay two hundred dollars, commencing 1st of January, 1861, to my nephew, John Lyell, for the purpose of educating him, said sum of two hundred dollars to be paid annually until said John Lyell is of age."

The testator's wife Statira and J. C. P. Hammond were appointed executors of the will, and qualified as such in November, 1859, when the will was proved. John Lyell lived with his parents in Texas. He would have come of age in 1866, but died on the 22d of April, 1863. No part of the money bequeathed for the purpose of educating him was ever paid to him, or used for that purpose.

The widow of the testator afterwards intermarried with James G. Moore. On the 15th of December, 1871, the present bill was filed by J. A. Anderson, as administrator of John Lyell, against Moore and wife, J. C. P. Hammond, and the sureties on the executors' bond, to recover against each of them "individually" the amount of the \$200 annuity, with interest.

Pending the suit Statira Moore died, and her husband qualified as

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her personal representative, and there was a revivor against him as such.

The chancellor, on final hearing, gave a decree in favor of the complainant against Moore, as executor of the wife, for the full amount claimed, namely, \$200 a year from 1861 to 1866, with interest, and dismissed the bill as to the other parties. Moore alone appealed.

It is argued against the complainant's entire right of recovery, that the words of the will in favor of his intestate are not sufficient to fix a charge upon the legatee, being expressive, merely, of a wish or request which she may disregard.

It is the intention of the testator which is to be sought after, and the real question in all cases of precatory words in a will is, whether the wish, or desire, or recommendation, expressed by the testator, is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion. *Williams v.*

Williams, 1 Sim. (N. S.) 358; *Bernard v. Mumshull*, Johns. (Eng. Ch.) 276; *Van Duyre v. Van Duyre*, 1 McCarter, 397.

We have two cases of our own, which illustrate the rule in both aspects. *Anderson v. McCullough*, 3 Head, 614; *Thompson v. McKissick*, 3 Humph. 631.

The words of the testator in this instance admit of no doubt. "It is my will and desire" that my wife "shall pay." It would have been difficult for him to have used language more expressive of positive intent on his part "to govern the conduct of the party to whom it is addressed." And it is by precisely the same words, "it is my will and desire," that he gives to the widow herself all the rights she acquires by the will.

A mere charge on land, payable at a future day, will not, it seems, ordinarily vest until the time of payment, and if the legatee die beforehand, the estate will go to the devisee freed from the charge. *Pawlett v. Pawlett*, 1 Vern. 321; *Phipps v. Lord Mulgrave* 3 Ves. 613.

But where the legacy is made a personal charge on the devisee, and so given as to vest upon the death of the testator, the payment being deferred, the death of the legatee before the time of payment will not affect the right of his personal representative to recover the legacy. *Hodgson v. Rawson*, 1 Ves., Sr. 44; *Jeal v. Titchener*, 1 Bro. C. C. 120; *Manning v. Herbert*, Amb. 575.

So if a direct bequest of a given sum be made to a legatee for a particular object or purpose defined by the will, the object or purpose being exclusively for the benefit of the legatee, and the application of the money not expressly controlled by the will, equity will not undertake to compel the application, and the death of the legatee will not affect the right of recovery.

Thus where money so given is directed to be invested in an annuity, it will go upon the death of the annuitant immediately after the testator, to the administrator. *Yates v. Compton*, 2 P. Wms. 308.

So where estates were given in trust to pay certain sums of money annually to three children during the life of their father, and one die, his administrator will be entitled to take his share. *Lewes v. Lewes*, 16 Sim. 266. So, where money is given to an infant to bind him as an apprentice, and he die before attaining the proper age for being bound out. *Barlow v. Grant*, 1 Vern. 255. And *a fortiori*, if the infant live, but for any reason the money be not applied to the specific purpose. *Barton v. Cooke*, 5 Ves. 461; *Gough v. Bull*, 16 Sim. 45. Our own cases are directly in point. *Laura Jane v. Hagen*, 10 Humph. 332; *Lynch v. Burts*, 1 Heisk. 600.

The rule in this class of cases is, where the bequest is manifestly intended for the general benefit of the legatee, and the time of payment is postponed for the convenience of the estate, the person or the property charged, or even for the supposed benefit of the legatee, the legacy vests at the death of the testator, and the death of the legatee before payment will not divest it. *Sidney v. Vaughan*, 2 Bro. P. C. 254; *Fonereau v. Fonereau*, 3 Atk. 645; *Lane v. Goudge*, 9 Ves. 225; *Noel v. Jones*, 16 Sim. 309.

The rule has been applied where a father devised a farm and stock to one son, upon condition that he annually, for seven years, pay a certain sum to another son, and the latter died within the seven years. *Bowker v. Bowker*, 9 Cush. 519. The reason being that the testator clearly intended the gross sum of the installments as the legacy of the second son, and extended the payment for the benefit of the first son.

I do not find, nor have the learned counsel produced any authorities to show that the rule has been extended to direct annuities, or cases where the only bequest is in the payments directed to be made, and the payments have been fixed at intervals in the future, with reference to particular circumstances in relation to the legatee which might render it doubtful whether the legacy would ever be wanted,

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or wanted beyond a part of the payments. *Birdsall v. Hewlett*, 1 Pai. 32.

There is a large class of such cases where it has been held or taken for granted that the payments end with the death of the legatee.

An annuity, or annual charge, may be for any period designated by the grantor, and charged on realty or personalty, corpus or income. *Morgan v. Pope*, 7 Col. 541, 547.

The devisee of property charged is usually personally liable for the payment of the charge. *Hill v. Sharp*, Thomp. Cas. 188; *Glen v. Fisher*, 6 Johns. Ch. 33; 10 Am. Dec. 310; *Larkin v. Mann*, 53 Barb. 267; *Cole v. Cole*, 53 Barb. 607. And may be made so directly without charging the property. *Armstrong v. Armstrong*, 4 Baxt. 357.

If the annuity or annual charge be for the maintenance of a particular person, without more, the conclusion would seem irresistible that the burden would cease with the life of the person to be maintained. And the additional limitation that the charge shall terminate on the coming of age or marriage of the beneficiary, cannot change the nature of the legacy. The remedy in such case, in the event of a breach, would be the actual damage. *Armstrong v. Armstrong*, 4 Baxt. 357.

So, if the maintenance be coupled with conditions touching the mode of performance, the party charged may insist upon compliance. Thus, where the testator gave the residue of his estate to the son and directed that his daughter should reside with and be maintained by him so long as she remained unmarried, it was held that so long as the son was willing the daughter should reside in his house, she was not entitled to any maintenance unless she did reside with him. *Wilson v. Bell*, L. R., 4 Ch. App. 581. Of course, if, for any reason, such residence was improper, a court of chancery would fix a pecuniary charge in lieu thereof. *Hill v. Sharp*, Thomp. Cas. 188. Or impound a sufficiency of the estate to raise the annual charge. *Morgan v. Pope*, 7 Col. 541. The death of the beneficiary in all such cases would, it cannot be doubted, at once terminate the charge.

We see no reason why the same rule should not apply to an annual charge for educating a person, which is in the nature of maintenance, where such person dies before the expiration of the time when the annual charge is to cease.

The question is, of course, one of intent in this class of cases. To continue the charge for the benefit of the estate of the legatee, after

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the legatee has by death ceased to need it, would be not to carry out an intent but to make one. No rule of law requires such a construction, nor has a single case been adduced, or found, which so adjudges.

The charge in this case is clearly upon the widow, not as executrix, and she being in any event primarily liable, her appeal would not bring up the case as to the coexecutor.

The liability of the subsequent husband of the devisee terminated with her death, a relic, perhaps, of the lore of the past, but the law of the State until modified by the act of 1877, chapter 79. *Jones v. Walkup*, 5 Sneed, 135; *Allen v. McCullough*, 2 Heisk. 183. And the bill does not seek to reach the property devised as being subject to the charge.

The decree will be modified by reducing the amount of the recovery in accordance with the opinion, and affirmed.

The bill, although somewhat equivocal in its form, does expressly ask for a decree against all the defendants "individually," and the decree is therefore within the pleadings.

The devisee could have made payment of the installments of 1861 and 1862, and having never offered to pay anything, should be charged with interest.

The complainant will pay the costs of the court, and the costs of the court below will be paid as directed by the chancellor.

MUMFORD V. MEMPHIS AND CHARLESTON RAILROAD COMPANY.

(2 Lea, 393.)

Surety — for faithful performance — change in principal's duty.

B. was appointed ticket agent of defendant at Memphis, and gave a bond with sureties for faithful performance of his duty. There were two ticket offices, but the bond did not specify to which he was appointed. Subsequently the offices were consolidated and the duties of both were imposed on him, and his salary was increased, without the knowledge of his sureties. *Held* (1), that parol evidence was admissible to show to which office he was originally appointed, and (2) that his sureties were discharged.*

SUIT on a bond. The opinion states the facts. The plaintiff had judgment below.

* To same effect, *Mary. Bank v. Dickerson* (12 Vroom, 465), 32 Am. Rep. 237, and note.

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Estes & Ellett, T. B. Turley and E. W. Mumford, for defendants.

Thames & Poston, for plaintiff.

FREEMAN, J. The suit is on a bond dated January 12, 1866, given by Adolph Bernard, as ticket agent of the road, with defendants and others as sureties. The suit is only here against the two sureties, Mumford and Chidester, Bernard having absconded. Judgment was rendered against them in the court below by the presiding judge, a jury having been waived by the parties, and appealed in error to this court.

The bond is in the sum of \$8,000, for the payment of which the parties bind themselves in the usual form. The condition of the bond is:

“Whereas, the said A. Bernard has been appointed ticket agent at Memphis, on the western division of the Memphis and Charleston railroad, now, therefore, if the said A. Bernard, during his term of office, shall faithfully perform all the duties of said office, and in all respects so conduct the same without detriment or loss, by his act or default, to the said Memphis and Charleston Railroad Company, then this obligation to be null and void; otherwise it shall continue in full force and virtue.” [Signed by the parties.]

The breach of the bond assigned is in failing to account to plaintiff for large sums of money received by him from the sale of passenger tickets during the months from January to September inclusive, of the year 1866—in all, the sum of \$6,958.57, as shown by an itemized account taken from the books of the company, made profert of in the declaration—which sum, with interest on the same from 19th of October, 1866, is claimed and sued for. The suit was commenced 21st day of January, 1867.

There was no motion for new trial, but a bill of exceptions was taken embodying the testimony heard by his honor, with his rulings on the matters of law presented for decision on which he based his judgment.

It appears from the record, that at the time of the appointment of Bernard, there existed two ticket offices in the city of Memphis, one at No. 18 Court street, in the business part of the city, the other at the depot of the company. The first office was filled and had been by P. Patterson & Bro., they being under a bond of \$10,000 for the faithful performance of their duties. At this office it seems the

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larger sales were made, and receipts considerably more than at the depot office. Such was the state of things when the bond sued on was given. On the 1st of June, 1866, Patterson & Bro. were discharged, and Bernard assigned to duty in that office during the larger part of the day, but required to close that office and be at the depot office so as to open the ticket office and commence selling tickets half an hour before the starting of the passenger train, as required by law.

These offices had existed separately, as stated, from the time the railroad had been completed, perhaps eighteen years up to date of discontinuance, June 1, 1866, the one agent having no right, or at any rate never having been accustomed, to sell tickets at the office of the other. One office was known as Memphis depot office, the other as Memphis city office. Bernard's salary, which had been seventy-five dollars per month before the new arrangement, was increased to \$100 or \$125 per month. Patterson & Bro.'s had probably been \$100.

Proof was introduced tending to show that the sureties had not been notified of the consolidation of the two offices, and probably knew nothing of it until after the defalcation in September.

No motion having been made in the court below for a new trial, if there had been a jury, there could be no error assigned upon the finding of the facts, and we take it the same rule must be held to apply where a jury is waived, and the judge acts both as judge and jury. The rule laid down in the case of *Wells v. Moseley*, 4 Col. 405, that "if the court can see from the record that the court below has committed material error affecting the merits of the cause, this court will reverse, whether a new trial was asked or not, but if the error in such case is to the action of the jury on the facts, this court will not reverse, unless the court below had been asked to correct the error and refused to do so," we think is a sound one, and comports with analogous holding on such questions, such as that the court must be requested to give additional instructions when desired, or this court will not reverse for failure to charge on such questions.

This brings us to the leading question in the case, the one on which it mainly turns, that is, whether the consolidating of the two offices, by dispensing with the agency at 13 Court street, and assigning Bernard to the duties of both offices, is such a change of the duties and addition to the responsibilities of the sureties as was not fairly contemplated by and embraced in the terms of the contract of the parties, construed in the light of existent facts and the known

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objects of the appointment, and the established course of business appertaining to the office to which Bernard was appointed, and for the faithful performance of the duties for which defendants became bound as sureties. This we think the fair scope of the question presented for our decision on this aspect of the case.

While it is true, as said by this court in *Chaffin v. Gullett*, 2 Sneed, 282, "parol evidence cannot be admitted, to vary or alter or explain the intentions of the parties as expressed in a written instrument," yet it is no less true, that application must be given to the contract by the surrounding circumstances, as we have said in several cases, in order to this, that we may clearly arrive at the intention of the parties, that to which their minds mutually assented, on which there was an agreement in the strict sense of the term, the court should place itself as near as it can from the facts, in the position of the parties, so as to see what they saw and contemplated as their undertaking. This must be arrived at mainly from the terms of the instrument, it is true, so far as the obligation is concerned, but what that obligation applied to, and what duties were to be secured in their performance in a case like the present, can fairly be ascertained alone from the surrounding circumstances.

It is the case of a latent ambiguity. On the face of the bond the contract is for the performance of the duties of ticket agent at Memphis. There are two offices at that point. To which was Bernard appointed is material, yet the writing does not show. The one not vacant is shown to have been filled at the time with an officer or agent under bond for the performance of its duties. The other was vacant, and an open position to be sought by parties desiring the situation.

Bernard no doubt sought this office through the usual means, the influence of his friends. The probabilities are that these sureties, as such friends, aided in pressing his claims for this vacant place—certainly knew to which office he was appointed. Such is the known course of business in such matters, and that the fact was so, is not, to say the least of it, a strained inference from what we have stated.

This being so, to say that we shall shut out the light of the facts, when we come to ascertain the application of the terms of this contract, or to say that the parties under such circumstances did not contract with reference to them, would be to exclude the most essential knowledge to be had as to what the undertaking referred to, and to assume that the parties contracted either blindly and generally, or

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for what in fact these circumstances definitely show they did not agree to, nor were even expected to assent to, that is, an agency in the occupied office at Court street.

Such a rule would not only not be to put ourselves in their places, to see what they saw, ascertain what they agreed to, but would be to take a different standpoint, see contrary to what they saw, and hold they agreed to what they certainly did not agree, that is, on the part of the makers of the bond, and what is equally certain the other parties did not believe or require they should agree to, because, as far as seen, the other place was filled by a competent agent, and his displacement was not contemplated at the time, nor probably thought of for months after the contract of the sureties was made. A man who becomes answerable for another is entitled to suppose that the transaction is in the usual course of business, and will not subject him to extraordinary risks that could not have been anticipated. 2 Am. Lead. Cas. 479.

Entire good faith is due to the surety, and if any fact material to his interest, increasing his responsibility, be concealed from him, it will operate to release the surety. We take it that this principle is unquestioned. If at the time of taking this bond, the company had determined to discontinue this office and impose its additional burdens, as well as largely increased receipts upon Bernard, it can scarcely be doubted that it would have been its duty to have informed the sureties of such a purpose. It would have been a fact peculiarly within its own knowledge, one which the surety could not, in the exercise of ordinary prudence, have known. Its concealment, under such circumstances, would have been a fraud upon the sureties. If this be so, the doing so afterward without notice or the assent of the sureties, must amount to the same thing.

The fact that no such concealment is shown or such purpose existed, demonstrates, however, that no such contract was contemplated by either party, therefore was not the contract entered into by the sureties, unless we say they did what they did not know, and the other received what it did not purpose, that is, a guaranty for the performance of duties not then purposed to be imposed on the agent then appointed. This reasoning would seem to be conclusive. What should be the result of this?

Many authorities we think may be cited in support of this view some of which even go beyond what we feel inclined to hold at present. In some of the English cases it is even held that in the

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case of an agent for the sale of coal, where it was stated in the bond that he was to have £100 per annum as a salary, which was afterward changed to a commission on the amount of the sales, it was held that this change in the mode of remuneration relieved the surety from responsibility, on the ground that it was a material change in the contract of the parties, and the sureties had the right to stand precisely on the facts recited in their contract. *Northern R. Co. v. Whinray*, 26 Eng. L. and Eq. R. 488. As we have said, we think this case carries the doctrine too far.

The case of *Bonar v. McDonald*, 1 Eng. L. and Eq. 1, better illustrates the true principle. In that case it was held, where a bank without the knowledge of the sureties, increased the salary of the agent, he undertaking to bear one-fourth part of all losses which he incurred by his discounts, the sureties on his bond were held discharged. Here the change of salary was also accompanied by an additional stipulation increasing the burden of the agent. In this case, though it did not appear that the loss had occurred from the discounting business, but consisted of a balance due from a customer of the bank, who had been permitted by the agent to overdraw his account to an unusual and unreasonable extent, without security, yet the lord chancellor, delivering the judgment of the House of Lords, said: "But if the arrangement as to the discounts altered the subsisting contract between the bank and its agent, so as to increase the liability of the latter, his sureties may be discharged for all purposes." Such is the law of England and Scotland, and so numerous cases hold. See cases cited in note of American editor, to p. 8, L. and Eq. R.

The true principle is very well stated by Mr. Fell in his work on *Guaranty and Suretyship*, page 248: "So in case of a continuing or subsisting guaranty, any material change in the manner of dealing between the principal and the creditor will discharge the guarantor or surety."

And so we think in a case like the present, any material change in the character of the business increasing the responsibility of the agent above that which was fairly contemplated by the sureties, must on sound principle release them from obligation of the contract entered into to indemnify only against the legitimate risks and responsibility of the position to which the agent was appointed, and not the added responsibility of the sales of another office, then filled by another agent.

In fact, the change was almost precisely that of imposing upon

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the securities the additional responsibility covered by the bond of Paterson & Bro. at the time of their contract. Surely this cannot be allowed without consultation or assent.

The two offices, as we have seen, were distinct and separate, and had been probably for eighteen years, the one known as the depot office, the other as the city office. The undertaking for the one can not be held to extend to the other without doing violence to the truth of the case, and making a contract, not construing and carrying one out as understood by the parties at the time.

The argument of PARKER, Ch. J., in the case of the *Boston Hat Manufactory v. Messinger*, 2 Pick. 232, may well close this view of the question on the affirmative phase of it. He says: "It must be presumed that the sureties had regard to the known course of transacting business when they consented to become responsible, and if it should be materially changed so as to increase the risk without their consent, they would in equity be exonerated from their liability, and if the principles of equity in relation to sureties was adopted and enforced at law, the bond would be avoided." This is conformable to the principles of justice and to the essential nature of contracts, for if an obligation is valid because it is evidence of the consent of a party to be bound, it surely cannot be converted into a different engagement which never had his consent, and we find cases decided both at law and equity have enforced this principle of natural justice.

That like defenses may be made in law as in equity in a somewhat analogous question, that is, release of surety by the creditor abandoning a security taken for the debt, we have lately held in the case of *Renegar v. Thompson*, 1 Lea, 457.

In reply to the argument of counsel for plaintiff, that it could not be seriously contended that the company could not change the number of its employees, either by increase or diminution, we would but say, that is not the question in this case. But the real question is, whether the company can accept an obligation guaranteeing faithfulness in an office to which a party is appointed, and then add the duties of another like office to it, thereby increasing the receipts more than double, consequently the risks of the sureties, as well as in like degree increasing the temptations of the agent to appropriate such increased proceeds, and then hold the parties to responsibility for this new engagement without notice or assent.

That the company understood they were imposing heavy additional burdens on the agent, is evidenced not only by the well-known addi-

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tional receipts in the new position, but by the fact that although motives of economy had prompted the change, yet the salary in the new and more responsible position was increased for the additional burden and responsibility, from seventy-five to one hundred and twenty-five dollars, as one witness says, but certainly to \$100 per month.

We do not deem it necessary to go into an examination of the various cases cited by plaintiff. Suffice it to say, they are mainly, if not all, cases where the duties of the precise office to which one party has been appointed have been in some degree changed, but in the legitimate course of business, and not the additions of another office with its burdens. Whether all of them are precisely reconcilable with the view of this opinion, we will not stop to inquire. If they are, or any of them hold differently, we do not approve such holding. We believe, however, they do not, when analyzed, conflict in the least with the principle of this opinion when fairly considered.

Other questions discussed need not be examined, as this is conclusive of the result in this case.

Rendering the judgment that should have been rendered by the court below, we reverse the case, and direct judgment be entered for the defendants.

McC CAMPBELL v. McC CAMPBELL.

(2 Lea, 661.)

Marriage — note from husband to wife.

Equity will enforce a note executed by a husband to his wife, during coverture, in consideration of her moneys received or collected by him.*

BILL to recover the amount of a note. The opinion states the facts. The complainant had judgment below.

H. H. Taylor, for complainant.

Caldwell & Son, for defendants.

COOPER, J. Bill by a widow against the executors of the deceased husband to recover the amount of a promissory note executed by the

* To same effect, *May v. May*, ante, 300.

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husband directly to her during the coverture. The chancellor granted the relief sought, and the defendants appealed.

The estate is solvent and therefore, no question touching the rights of creditors is involved. Nor is there any serious difficulty in regard to the facts. At the time of the marriage of the testator and complainant, the complainant owned some little personal property, and a few hundred dollars due to her by note, and as her distributive share of her father's estate. The note in controversy is for \$100, and bears date the 23d of June, 1866, about nine years before the death of the husband. The proof shows that the husband permitted the wife to hold and renew in her own name the notes held by her at the time of the marriage, or afterwards received. There is also proof that the husband intended that the wife should have all the property brought by her into the marriage; that no part of it should be used for the support of the family, or be divided in the division of the estate. In 1871 he made a will in which he bequeathed to his wife, among other things: "All the notes of hand in my possession that are taken in her name either before or since the marriage." In a subsequent will, which is the one under which the defendants are acting, he proposed to insert a similar provision, but the draughtsman told him it was unnecessary, the notes being payable to her. One of these notes of a third person was found in a pocket-book in a chest in which the testator kept his papers, and to which both the husband and wife had access. In the same chest was found the note in controversy, loose among the papers. The complainant had claimed that there was such a note, and it was found upon search in the presence of the parties. The complainant testifies that the note was given for money received as part of her distributive share of her father's estate. This fact is, however, not material to her rights.

The law of this State is that a wife is entitled, by right of survivorship, to all her choses in action not reduced to possession by the husband during coverture. *Bryant v. Puckett*, 3 Hayw. 252; *Ross v. Wharton*, 10 Yerg. 190. And there is in this respect no distinction between a chose in action accruing to the wife during the coverture, and a chose due her before marriage. *Cox v. Scott*, 1 Memph. L. J. 248. The law is the same if the chose be made payable to husband and wife, whether the consideration pass from the wife, *McMillan v. Mason*, 5 Col. 263, or from the husband. *Johnson v. Lusk*, 6 Col. 113; *S. C.*, 1 Tenn. Ch. 3. And creditors of the husband

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cannot reach the choses in action of the wife without his active aid in reducing them to possession. *Snowden v. Lindsley*, 4 Col. 122; *Harris v. Taylor*, 3 Sneed, 536; *Embry v. Robinson*, 7 Humph. 444. The wife is moreover entitled to a settlement out of such chose as against the husband and his creditors. *Dearin v. Fitzpatrick*, Meigs, 551. Whether an act of the husband in converting a chose in action of the wife is a reduction into possession depends upon his intention. If he actually collect the money, but only as the agent of the wife, and invest it in property for her benefit, the property will belong to the wife, even against the husband's creditors, although the title be taken to the husband. *Ready v. Bragg*, 1 Head, 512. So, if the wife make the collection, and with the consent of the husband, vest the money in realty in her name. *Cox v. Scott*, 1 Memph. L. J. 248. And the fact that the husband assents to what is done is sufficient to uphold the right of the wife, and exclude the idea of reduction into possession by him, without proof of an express promise on his part. *Cox v. Scott ut supra*; *Tarbox v. Tonder*, 1 Tenn. Ch. 164, 168. A consideration passing from the wife will sustain a direct conveyance of property by the husband to her, and the very nature of the transaction will fix the property, even if personalty, with a trust for the separate use of the wife without any words to that effect. *Powell v. Powell*, 9 Humph. 477; *Saunders v. Harris*, 1 Head, 207. And an ante-nuptial settlement will prevent the note of a firm, of which the husband is a partner, previously executed to the wife, from being extinguished by the marriage. *Bennett v. Winfield*, 4 Heisk. 440. And sustain the wife's right to the proceeds of such a note executed after the marriage. *Cowan v. Mann*, MS. opinion, by FREEMAN, J. At an early day, it was held that the consideration of money borrowed from the wife would, in equity, make the husband a trustee for the wife. *Slanning v. Styles*, 3 P. Wms. 384. If, therefore, a note be given by the husband to the wife for money advanced by her out of her separate estate, it constitutes a declaration of trust in favor of the wife. 1 Dan. Neg. Inst., § 241, citing *Murray v. Glaspe*, 23 L. J. Ch. 126. To the same effect seems to be the case of *Huber v. Huber*, 10 Ohio, 37, cited, with approval, by Judge TURLEY, one of the most eminent of our predecessors on this bench, in *Powell v. Powell*, 9 Humph. 488. And so, in principle, is the decision upon an obligation of the husband made directly to the wife, promising to pay money borrowed, in the case of *Hind's Estate*, 5 Whart. 132.

These principles are in accord with the current of authority in other States. 1 Bish. Mar. W. 119 *et seq.*, 123, 161, 728, 757; 2 Story Eq. Jur., § 1373; Perry on Trusts, § 639.

The facts bring this case within the rule. The declarations of the husband, his acts and the circumstances show that it was not his intention to reduce the wife's choses in action to possession, and the execution of the note constituted a declaration of trust in favor of the wife which equity will enforce, there being no question as to the rights of creditors.

Ordinarily, when a husband is charged as a trustee with the funds of the wife, he will not be held liable for the interest used for their common benefit. *Lishey v. Lishey*, 2 Tenn. Ch. 5; *Hind's Estate*, 5 Whart. 138. But this doctrine proceeds on the ground of an agreement on the part of the wife, express or fairly implied, that the interest might be so used, and that it was used. The evidence in this case fails to show any such agreement or use of the money, and on the contrary, fairly implies, if it does not positively establish, that it was the intention of the husband to give the wife the benefit of the interest, as well as the principal.

Affirm the decree with costs.

RENEAU V. STATE.

(3 Lea. 732.)

Criminal law — homicide — officer shooting prisoner to prevent his escape.

Where an officer had in custody a prisoner charged with a misdemeanor, and the prisoner trying to escape, the officer shot and killed him, without intending his death, he was guilty of manslaughter. (*See note, p. 628.*)

CONVICTION of manslaughter. The opinion states the facts.

J. M. Meek and J. P. Swann, for defendant.

Attorney-General Lea, for State.

McFARLAND, J. The prisoner appeals from a conviction of manslaughter for the killing of Vineyard Thomas. The facts are that

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Thomas, the deceased, was arrested by the prisoner, who was a constable, under a warrant charging an assault and battery, before the justice of the peace. Thomas pleaded guilty, and was adjudged to pay a fine and costs, and in default of security was committed to jail, and in the execution of a *mittimus* issued by the justice for that purpose, the prisoner started with Thomas to the county jail, accompanied by another person as guard. On the route Thomas started to run and make his escape. Neither the prisoner or his guard pursued, but after commanding Thomas three times to halt, and not being obeyed, the prisoner fired two shots at Thomas, one of which took effect, killing him almost instantly. The prisoner is shown to be a man of good character, and he expressed regret at the result, saying that he did not intend to kill the deceased. The latter was of bad character for violence, and had threatened that he would not submit to arrest. The law on this subject, as laid down by Mr. Bishop, is in substance, that an officer having a prisoner in custody for felony who attempts escape, will be excused for killing him if he cannot be otherwise retaken, but if he can be otherwise retaken in any case without resort to such harsh measures, it will be at least manslaughter to kill him. But in cases where the person slain is arrested or held in custody for a misdemeanor, and he fly or attempt to escape, it will be murder in the officer to kill him, although he cannot be otherwise overtaken; yet under some circumstances, it may be only manslaughter, as if it appear that death was not intended. 2 Bish. Cr. Law, §§ 648, 649. It is considered better to allow one guilty only of a misdemeanor to escape altogether than to take his life. And we may add that it may be a question worthy of consideration whether the law ought not to be modified in respect to the lower grade of felonies, especially in view of the large number of crimes of this character created by comparatively recent legislation, whether as to these even escape would not be better than to take life. The charge of the judge in this case was in accord with the law as above stated, and the jury have given the prisoner the benefit of all doubts, and convicted him of the lower grade of homicide. It is argued that the offense for which the deceased was arrested was in reality a felonious assault, and the prisoner had the right to hold him in custody for this grade of offense, but it clearly appears that the warrant under which he was arrested charged only an assault and battery, and the judgment and *mittimus* of the justice only committed him in default of security for fine and costs for a

misdemeanor. We see nothing to change the principle, in the fact that the deceased had been adjudged to pay the fine and costs by the justice of the peace, as to the duties of the officer. His duties were the same, whether he held the prisoner in custody after or before the judgment of the justice. The prisoner doubtless acted under the belief that erroneously prevails as to the rights of a public officer, that is, that he may lawfully kill a prisoner if he fails to obey his command to halt. This is a very erroneous and very fatal doctrine, and must be corrected. Officers should understand that it is their duty to use such means to secure their prisoners as will enable them to hold them in custody without resorting to the use of fire-arms or dangerous weapons, and that they will not be excused for taking life in any case, where, with diligence and caution, the prisoner could be otherwise held.

While the prisoner in this case seems to have honestly entertained the opinion that his duty required him to do what he did, and to have acted entirely without malice, and while he is entitled to strong sympathy, still we are constrained to affirm the judgment.

NOTE BY THE REPORTER. — Wharton (1 Cr. Law, §§ 404, 406) draws the same distinction between felonies and misdemeanors, in respect to the officer's right to kill to prevent escape. As to misdemeanors, he says: "Unless it be in case of riots, it is not lawful for an officer to kill a party accused of misdemeanor if he fly from the arrest, though he cannot otherwise be overtaken. Under such circumstances (the deceased being only charged with a misdemeanor), killing him intentionally is murder; but the offense will amount only to manslaughter, if it appear that death was not intended."

In *Stickmore v. State*, 2 Tex. Ct. App. 20, a policeman was conducting a prisoner to the calaboose, when the latter stopped and refused to go farther, and tried to get away, whereupon the policeman struck him over the head with a six-shooter pistol. There was no evidence that the prisoner was assaulting the policeman, and it was proved that other persons were within call, but that their aid was not sought by the policeman. Held, that, under the circumstances, the policeman was not justified in striking the blow, and his conviction for an aggravated assault affirmed.

Hambright v. National Bank.

HAMBRIGHT V. NATIONAL BANK.

(S Lea, 40.)

National bank — bill to recover usury.

A bill in equity will not lie to recover usury from a national bank.

BILL to recover usury. The opinion states the case. The demurrer below was sustained. Both parties appealed.

J. N. Aiken, for complainant.

P. B. Mayfield, for defendant.

FREEMAN, J. This bill is filed to recover usury alleged to have been paid within the last six years. A demurrer was filed, on the ground that the party could only sue for, and recover under, the thirty-fourth section of the national banking act as therein provided, and that national banks were not subject to the regulations of the State on this subject. The chancellor overruled the demurrer on these points, but sustained it on another, to wit, that the defendant could not be called on to make a discovery that would expose it to penalties for violations of law. Both parties appealed.

We have heretofore held, as ruled by the chancellor on the first question, and our court has taken jurisdiction of such question. See case of *Steadman v. Redfield*, September term, 1874. The case of *Farmers and Mechanics' Bank v. Dearing*, 91 U. S. 29, had not then been decided. This case distinctly holds the contrary doctrine to that laid down by this court. The syllabus of that case is as follows: "The provisions of the national banking act, imposing penalties upon national banks for taking usury, supersedes the State laws on that subject. That national banks organized under the act are instruments designated to be used to aid the government in the administration of an important branch of the public service; and congress, which is the sole judge of the necessity for their creation, having brought them into existence, the States can exercise no control over them, nor in anywise affect their operation, except in so far as it may see proper to permit."

This being a federal question, over which the Supreme Court of the United States has jurisdiction, we are compelled to yield to the authority of that court, and do so — notwithstanding our previous holding to the contrary.

The result is, that the decree of the chancery is reversed, the demurrer sustained on the ground stated, and bill dismissed at the cost of complainant, in this court and court below.

SPIRO V. PAXTON.

(3 Lea, 75.)

Exemption — partnership property.

Partnership property is not exempt from execution, before division and settlement of the partnership affairs.*

THE opinion states the case.

L. A. Gratz, for Spiro.

George Washington, for Paxton.

FREEMAN, J. The facts are, that a partnership existed between Herman Spiro and his brother, the former being married, the head of a family, the other not. Judgment was had on firm liability, and levied on a wagon owned by the firm and used in their business as bakers for delivery of bread to customers.

The question made in the case is, whether our statute exempting certain property in the hands of the head of a family, including a wagon, applies in favor of the firm, one member being entitled to such exemption as head of a family as to his individual property. We hold with what is conceded to be the weight of authority, that the exemption does not apply. This is not individual property in his hands, but the property of the firm. The individual has no separate interest in it until the firm is settled up, its debts paid, and in this case, as it is insolvent, has none or will have none. The policy of the statute is to exempt such property as is used by the party for the

* To same effect, *Wies v. Frey* (7 Neb. 190, 29 Am. Rep. 332).

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benefit of his family and their convenience, but does not include property owned by a firm and used in their business for profit. We do not deem it necessary to go into a discussion of the reasons for and against this conclusion, or the opinion of courts of our sister States that have maintained the one view or the other. A full citation of cases and discussion will be found in Thompson on Homestead and Exemptions, § 127 *et seq.*

The charge of his honor, holding the property not exempt, was correct, and the judgment is affirmed.

MOBILE LIFE INSURANCE COMPANY v. MORRIS.

(3 Lea, 101.)

Insurance — life — evidence — declarations of insured.

In an action on a policy of insurance on the life of one for the benefit of another the declarations of the insured, before or after the insurance, are not competent evidence, unless part of the *res gesta*. *

ACTION on a policy of life insurance. The opinion states the case. The plaintiff had judgment below.

J. H. Gaut, for insurance company.

P. B. Mayfield, for Morris.

DEADERICK, Ch. J. This action was brought by defendant in error to recover \$1,000, the amount of insurance upon the life of Blount Morris, taken by him upon his own life for the benefit of said James B. Morris, his son.

Verdict and judgment were for the plaintiff below, and the court refusing a new trial, the insurance company has appealed to this court.

[A question of practice omitted.]

Upon the application, Blount Morris had answered, as insisted by defendants below, falsely, questions propounded to him, as to his age and health. He stated that he was sixty years old, and that he had never had any one of several diseases named, whereas it is

* Compare *Stetson v. Mass. Mut. L. Ins. Co.* (63 N. Y. 166), 20 Am. Rep. 522.

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insisted that he was sixty-nine years of age at the time, and had been subject to several of the diseases about which he was interrogated. These facts, if true, would materially increase the risk, and by the terms of the contract, avoid the policy.

In order to establish these facts, the defendant, on the trial below, offered to prove by several witnesses introduced by him for that purpose, that Blount Morris, both before and after he had taken out the policy, had at various times admitted facts showing that at the time of taking said policy, he was about sixty-nine years of age, and also that he had had one or more of the diseases which he had denied on his examination that he ever had.

The court, upon objection made, excluded said evidence, and defendant excepted. And this ruling by the court, it is insisted by the plaintiff in error, is erroneous.

It is certainly true, that the facts in respect to the age and health of the insured, which it was sought to establish, were legitimate, if proved by the direct testimony of witnesses who had knowledge of them. But the point of the objection is, that they are not provable by evidence of the declarations or admissions of a party whose life is insured for the benefit of another.

Upon this question there is a conflict of opinion, the earlier cases holding that the evidence is admissible for the purpose of proving fraud in obtaining the policy, See Bliss on Life Ins. 620; citing 35 Conn. 225; 6 East, 188; Ellis on Ins. 123. In these cases the declarations were made very shortly before, or after the policy was issued, and in some of them they were held admissible as parts of the *res gestæ*

On the other hand, where a policy was for the benefit of a wife, it was held that the admissions of the husband, who was the insured, made after it was issued, were not competent, upon the ground that they were the declarations of a stranger, who was neither a party to the action, nor, at the time of making them, the agent of a party. Bliss on Ins. 631-633, § 372; citing 7 Ohio, 292; 10 Kans. 525, and other cases. After reviewing the cases, the author says: "The views adopted in the cases cited from Ohio and Kansas seem most in accordance with correct principles." Bliss on Ins. 634. And this view of the question was adopted by this court, in an elaborate opinion, and upon a careful review of the authorities, by Judge McFARLAND, at Jackson, at April term, 1872, and reported in 9 Heisk. 606.

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The declarations offered to be proved in this case were made, as stated in the offer, some several months, others several years after and before the policy issued, and of course there can be no pretense that they were parts of the *res gestæ*. We therefore hold that there was no error in rejecting the evidence of the declarations of Blount Morris as to his health and age, made before and after the policy issued.

[Omitting an exception to the charge.]

Judgment affirmed.

BUTTERTON v. ROOPE.

(3 Lea, 212.)

Debtor and creditor — liability of latter for loss of collateral.

R. being indebted to B., indorsed to him a draft on C., due in thirty days, to be credited on account when collected. The draft was not presented for payment, and C. became insolvent. *Held*, that B. had lost his remedy against R. on the draft and on the original demand.*

ACTION on account. The opinion states the case. The plaintiff had judgment below.

E. M. Dodson, for Butterton.

Lewis Shepherd, for Roope.

FREEMAN, J. Butterton sued defendant by summons before a justice of the peace for Hamilton county in a plea of debt due by account. The case went by appeal to the Circuit Court, where it was tried by the court, a jury being waived, and judgment rendered for plaintiff for the amount of his account.

The facts necessary to be stated are, that on the 9th June, 1877, the defendant was indebted to plaintiff by the amount of the account sued for in this case. When called on for the money he stated he did not have it, but indorsed and handed plaintiff a draft, drawn by the agent of the company, on Bartow Iron Company, payable at Rome, Georgia, thirty days after the above date. He said to plain-

* To same effect, *Hanna v. Holton* (78 Penn. St. 334), 21 Am. Rep. 20.

tiff at the time, you can use the draft. At the same time a receipt was executed as follows:

“Received of James Roope a draft on Bartow Iron Company for one hundred and twenty dollars, payable thirty days from date, dated June 9, 1877, to be credited on his draft (account) when collected.”

Plaintiff indorsed the draft to the Discount and Deposit Bank of Chattanooga, and got the money on it. A few days after the draft fell due, it not having been paid, plaintiff paid it to the bank and took it up.

The Bartow Iron Company was solvent both in Georgia and at Chattanooga when the draft was drawn, and when it fell due, and was paying its paper promptly, until the fifteenth or sixteenth of July, three days after the maturity of this draft. The company had kept an agent at Rome authorized to accept drafts and pay them, until a few days before this draft was due, but had removed the agency to Chattanooga, where all accepted drafts were paid up to the day of suspension above stated. From the facts shown in proof it is clear, if the draft had been presented when due, it would have been paid.

It further appears that in August, 1877, plaintiff sued defendant Roope, the Bartow Iron Company, and Bank of Discount and Deposit, on this draft, before L. B. Headrick, a justice of the peace, who after hearing, entered a regular decree as his judgment in the case, with the reasons for his conclusions. We need not examine the correctness of this judgment. Suffice it to say he gave judgment in favor of Roope and the company, and against the bank, and was careful to add “that this was without prejudice to the rights of the plaintiff or any one else to sue over again either on the paper or for any cause of action, and in any form.” The bank has appealed, but what has been the result of the case we do not know. As it is claimed this is an adjudication of the rights of the parties and conclusive of the present case, we need but say that this cannot be so held. That was a suit on the draft against defendant as indorser, a judgment in his favor in that case was not an adjudication of the questions involved in this case, which are his liability on the facts for the original indebtedness due by account, and his rights on the facts we have stated, arising out of the failure of the holder of the paper to present it for acceptance or payment.

It is clear from the testimony, and especially the contract of the

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parties in the concluding part of the receipt, that the draft was not taken as a payment of the account. The amount was to be credited on the account when collected; not having been collected it cannot be claimed the credit shall be given by the language and letter of the contract. Is he entitled to get the benefit of this draft by way of recoupment or otherwise, because of failure to present for payment, as a matter of law growing out of the contract of the parties?

There was no need of acceptance, or presentment for such acceptance, in this case, the bill being drawn by the party or company through its agent or the company. Dan. on Neg. Inst. 8, § 482. The transfer of the draft was but as collateral to the debt, and the creditor so receiving the paper takes the place of the holder as to his rights on the paper, and assumes the duties of such holder. See Dan. on Neg. Ins. § 828.

The fair construction of the contract of the parties is, that he will use proper diligence in the collection of the security, and will account for the same, and he is certainly forbidden such negligence as shall produce loss to the debtor who transfers the paper to him. His duties arise out of the transaction. He receives from his debtor a draft or negotiable paper which, by law, is due on a certain day. It is his duty to present the paper for payment on that day, and as he has the indorsement of his debtor on the paper, he ought probably to give him notice of the failure to pay; certainly so, if he seeks to hold him on the paper or his indorsement.

The question of notice to the indorsing debtor in this case is not, however, material. The question is, whether there was a neglect of duty on the part of the creditor receiving the draft, by reason of which the debtor has been injured. That this is true is beyond question. If the creditor had received of his debtor a check and failed to present it, the principle would have been the same precisely. If he had received part or all the money on the draft, and failed to credit it, beyond question such receipt would have been a good defense *pro tanto*, or in the whole, to collection of the debt due by the account; so, we think, on sound principle, a failure to receive when he ought to have received, such failure being the result of his own negligence or the party to whom he had indorsed it, should equally work the same result. He fails to account in either case for the collateral. He has had the benefit of it as a security for his debt, and took it as a means of payment, thus depriving the original holder of the right to control it, and putting himself in his place. He cannot

impose upon him the entire loss, when it results from his own neglect while controlling or having the right to control the paper. It may have been the neglect of the bank to which he indorsed it, and received the money in advance on it for his own use. If so, he cannot avoid his own liability, but must look to the bank for his indemnity, if he has any remedy. He cannot inflict the loss on his debtor.

We find authorities sustaining these views. In a recent English case, says Mr. Daniel (Neg. Inst., § 828), where the defendant indorsed to the plaintiff a bill, of which he was indorser, as collateral security for a debt of greater amount, then due, the residue of which he paid in cash, and the plaintiff failed to make presentment or to give notice, it was held that he had lost recourse upon his indorser, both on the bill and on the original debt. BYLES, J., said: "That as they had the rights so they had the duties of the holders." See cases cited; *Peacock v. Purcell*, 14 C. B. (N. S.), 728; see, also, 3 Am. Law Reg., 440.

So, too, in a late case in New York where the defendants, a firm in Buffalo, being indebted to the plaintiff's firm in New York, forwarded by mail a draft on another business house in New York. The plaintiff, about half-past 1 o'clock on the day of the receipt of the draft, presented it to the drawers and received a check for the amount. This party had funds in the bank on which the check was drawn, and the check would have been honored if it had been presented that day. The check, however, was deposited by the plaintiff in his own bank, and did not reach the other bank until 12 o'clock the next day, and after the drawer had failed. It was held that the plaintiff was guilty of laches in failing to present the check on the day it was received, and the defendants were released from liability for their indebtedness. *Smith v. Miller*, 43 N. Y. 171; 3 C., 3 Am. Rep. 690.

This case is put on the grounds that a party receiving securities of this kind may so deal with them as to discharge his debtor, whether they be paid or not, that he may make them his own by such dealing, as by giving time for payment or other act prejudicial to the debtor, and this result will follow any neglect or laches of the creditor in obtaining payment of negotiable instruments transferred, from which loss or injury ensues.

By receiving the securities, says the court, and assuming the collection, he undertakes to do all that the law requires to be done to

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obtain payment, and if he fails in the performance of that duty the debtor is discharged, citing *Cannady v. Allenby*, 6 B. & C. 378; Story on Bills, § 109. Laches which would discharge the drawer or endorser of a bill will as effectually extinguish the debt for the payment of which a bill or other negotiable security is transferred. Story on Bills, §§ 419, 109 and note. See cases cited in this case. These authorities seem conclusive of the question, and are so consistent with the right of the case that we feel no hesitancy in adopting them.

The result is, the judgment of the court below is reversed and a judgment for the defendant will be entered here.

GETTYS V. GETTYS.

(3 Lea, 260.)

Marriage — divorce in another State — obtained without residence.

A decree of divorce obtained in another State, where neither party at the time had a residence in good faith, is void.*

BILL for divorce. The opinion states the case. The complainant had judgment below.

A. S. Prosser and Houk & Gibson, for complainant.

W. P. Washburn and Logan & Luckey, for defendant.

DEADERICK, Ch. J. Rebecca and James Gettys were married in Pennsylvania in 1866. Previous to the marriage they entered into a contract in contemplation of marriage, she relinquishing all claim to his estate, real or personal, if she survived him, and he agreeing, in consideration thereof, to secure her an annuity of \$300, after his death and during her life. They resided, from the time of their marriage, in the county of McMinn, Tennessee, where defendant James had property and carried on business, until, as she alleges he proposed she should remove to Knoxville and he would remain at Athens and visit her occasionally. In 1876 she filed a bill against him for divorce and alimony, on the ground of cruel treatment and

* To same effect, *People v. Baker* (76 N. Y. 73), 22 Am. Rep.

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abandonment. To this bill respondent James answered, denying her charges and alleging in a cross-bill that his life was in danger from her, and asking a divorce from her. Both bills were dismissed, and James Gettys appealed, but did not prosecute his appeal in this court.

Mrs. Gettys filed another bill for divorce and alimony in the Chancery Court, at Knoxville, in January, 1878, alleging that she had obtained information that defendant James Gettys, in the fall of 1877, had gone to Utah territory, taking his son with him as a witness, and there obtained, on the 8th of October, 1877, a decree of divorce, which is exhibited with her bill, and which she alleges shows inhuman conduct toward and treatment of her.

The decree purports to be rendered in the Probate Court of Salt Lake county, in the territory of Utah, and it appears from the transcript and an affidavit of complainant James Gettys, that proceedings were instituted in the Utah court August 25, 1877, and a final decree declaring complainant had forfeited her rights under the marriage contract, for divorce rendered on the eighth of October next, thereafter. It is alleged in Mrs. Getty's bill that at the time the affidavit of defendant James bears date, "August 25, 1877," which purports to have been made and attested in Utah, the said James was at his home in Athens, McMinn county, and that he was absent in Utah but a few weeks, went expressly to institute proceedings against his wife for divorce, and returned to his home when his object was accomplished, and that he was not a *bona fide* resident of Utah at the time said suit was instituted, but had his domicile in Tennessee, where his business was carried on during his temporary absence. The defendant filed a demurrer to the bill, relying in various forms upon the validity of the proceedings of the said Probate Court of Utah, by which the relation of husband and wife had been dissolved between complainant and defendant, and insisting she had no legal claim upon him as his wife. The chancellor overruled the demurrer and allowed defendant Gettys to appeal.

It is true that the judgments and decrees of a sister State are entitled, ordinarily, to have full effect in the other States, but in order that the courts of any State shall have jurisdiction in divorce cases, either the husband or wife must be a *bona fide* resident of the State in which the proceeding is instituted, and if one of the parties, merely for the purpose of obtaining a divorce, goes to another State, not intending to make it his home, such temporary residence does

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not confer jurisdiction of the marriage relation. Any other rule, ~~as~~ affording facilities for unscrupulous parties to cheat the courts of their domicile of its rightful jurisdiction over this important relation, would be most demoralizing in its consequences. Numerous recent cases have arisen and have been most carefully and elaborately considered by distinguished jurists, of divorces thus fraudulently obtained, and has been held that they are absolutely null and void. *Sewall v. Sewall*, 122 Mass. 156; *S. C.*, 28 Am. R. 299; *Litowich v. Litowich*, 19 Kans. 451; *S. C.*, 27 Am. R. 145; *Cox v. Cox*, 19 Ohio St. 502; *S. C.*, 2 Am. R. 415; *People v. Dawell*, 25 Mich. 247; *S. C.*, 12 Am. R. 260; *Prosser v. Warner*, 47 Vt. 667; *S. C.*, 19 Am. R. 132; Cooley Const. Lim. 400.

[Omitting a minor point.]

Decree affirmed.

SWAFFORD V. FERGUSON.

(3 Lea, 292.)

Infancy — contract — void or voidable.

An infant's deed, without consideration, is void, and not simply voidable.*

BILL to avoid deed. The opinion states the case. The bill was dismissed below.

Thos. & D. L. Snodgrass, for complainants.

J. T. R. Swafford and *Spears & Spears*, for defendants.

McFARLAND, J. S. E. Ferguson purchased of David Cleage, and M. M. Cleage, his wife, seven lots in the town of Pikeville, at the price of \$250 — fifty dollars of which sum he paid in hand, and executed his notes with surety for the remainder. Said Cleage and wife, by the direction of Ferguson, executed a deed conveying the lots to Emily Ferguson, the wife of said S. H. Ferguson and her heirs in fee simple. Said Emily Ferguson afterwards died intestate and without issue, leaving her brothers and sisters and two nieces her

* See *Harner v. Dipple* (31 Ohio St. 73), 27 Am. Rep. 494.

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heirs at law. Ferguson paid his notes for the purchase-money of said lots, partly in the lifetime of his said wife, the remainder of about \$100, after her death. After the death of Mrs. Ferguson, her brothers and sisters and one of her nieces, being all of her heirs except one, joined in a quit-claim deed, conveying their title to the lots to said S. H. Ferguson. The conveyance was without consideration. The bargainors were all infants, under twenty-one years of age, except R. H. Swafford and Nancy A. Northup, the wife of S. B. Northup. The original bill was filed by R. H. Swafford and said infants, including Emma Swafford who did not join in the conveyance, by said R. H. Swafford their next friend, to have their deed declared void, and to recover their interest in the lots, with an account of rents. S. H. Ferguson and Northup and wife were made defendants.

S. H. Ferguson filed a cross-bill, in which he claims a resulting trust in the property in his favor, by reason of the fact that the purchase-money was paid by him; or in the event this relief be denied him, he asks to be substituted to the vendor's lien for the purchase-money paid by him. The chancellor dismissed the bill as to all the complainants except Emily Swafford, holding that the deed of the infants was only voidable at their election after obtaining their majority, and they being still infants at the filing of their bill, the next friend had no right to file the bill in their behalf. A decree was rendered in favor of Emily Swafford for her share of the property with an account of rents. The other complainants have appealed. R. H. Swafford being of full age at the execution of the deed cannot avoid its effect as to him. As to the infants, the question is different. According to the authorities, if the chancellor's premises were correct, that is, if the deed was only voidable and not void, then his conclusion was correct, as in that event no one but the infant after attaining his majority can call the deed in question. It is generally said that the deed of an infant is voidable, but the rule, as stated by Judge GREEN in the case of *Wheaton v. East*, 5 Verg. 41, is as follows: "When the court can pronounce the contract to be to the infant's prejudice it is void — when to his benefit, as for necessities, it is good — and when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infants." This, Judge GREEN says, is the language of Lord Ch. J. EYRE, and was quoted with approbation by Judge STORY, in 1 Mason, 82, and by Chancellor KENT, 2 Com. 193. Judge

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GREEN gives as an instance of a void contract, by an infant, his becoming surety for another, as in such case it can only be to his prejudice. The deed of the infant in the case of *Wheaton v. East*, was held voidable only at the election of the infant, as it was a sale and conveyance of land for a full price paid.

The same rule was approved in the case of *McGan v. Marshall*, 7 Humph. 121, and in *Scott v. Buchanan*, 11 id. 468. The deeds in both of these cases were held voidable only at the election of the infant after attaining majority. The first being a mortgage by which the infant secured credit, which the court said might have been beneficial to him. The latter was a conveyance upon a consideration which enured to the benefit of the infant.

If the rule as settled by these authorities be correct, it must follow that the court should treat the deed of the infants in this case as void, as it was the conveyance by them of title to property which they clearly owned and which was of some value, without any consideration, and it was necessarily to their prejudice, and could not by possibility be otherwise.

It is entirely different from a sale for a consideration, which might be to their interest.

The conclusion of the chancellor is therefore erroneous, and we think this is a sound rule to apply to conveyances obtained from infants without any consideration whatever.

There is nothing in the cross-bill of Ferguson — whatever may be his moral equity, he can have no relief growing out of the fact that he paid the purchase-money. It was a settlement upon his wife, executed, so far as he was concerned, and cannot be retracted, and having secured no rights under the deed he can have none. It is clear that he could not set up, as against his wife, either a resulting trust or claim for purchase-money — the law would raise no such presumptions and make no such substitutions in his favor, and he can have no greater claim to relief against her heirs.

The decree will be reversed and a decree ordered for the infant complainants, with the costs of this court, and the cause remanded for an account of rents.

RUOHS v. HOOKE.

(8 Lea, 302.)

Homestead — fraudulent conveyance.

Where a husband voluntarily conveys land to his wife to hinder and delay his creditors, her right to a homestead therein is not lost. (See note, p. 645.)

BILL to set aside a conveyance. The opinion states the point. The complainant had judgment below.

Key & Richmond, for complainant.

Van Dyke, Cooke & Van Dyke, for defendants.

FREEMAN, J. This bill is filed by a creditor of R. M. Hooke, alleging a judgment of \$500, in the Circuit Court of Hamilton county, execution and return of "*nulla bona*," and then, among other things, that R. M. Hooke, in October, 1873, conveyed by deed to his wife, what is known as the "Star Fort Hill" property, a house and lot occupied by them as a home, situated in the city of Chattanooga, and that this conveyance was void as to creditors.

This conveyance purports on its face to be made for "love and affection," and is so charged in the bill. It appears also that this property had been conveyed previously by deed in trust to a trustee, with other property, to secure a debt due J. E. Raht, of \$5,000. This conveyance is dated June 11, 1873. It is then alleged that complainant was creditor of Hooke when the conveyance to his wife was made, "and that he was insolvent, or at least so much indebted as to greatly impair his ability to pay his debts by said conveyance." The deed of trust referred to, with others, is stated to be unrecorded.

The prayer of the bill is for an attachment of the equitable interest of said Hooke in the property; that an account be had of the debts due, the property sold, and liens be discharged created by deeds of trust, and residue applied to the satisfaction of complainant's debt. It is also especially prayed that the aforesaid deed to the wife be set aside as fraudulent and void.

The chancellor decreed the deed of October, 1873, fraudulent in

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law and void, being made without consideration. He also denied the right of the wife to a homestead in said property.

From this decree the husband and wife appeal, in *forma pauperis* to this court. Two questions are presented. Was the deed fraudulent and void? And was the wife, under the facts of the case, entitled to a homestead?

The answer of respondents admit the conveyance to the wife, but say it was recited that it was made for love and affection, but in reality, the conveyance was in consideration of about \$3,000, money belonging to the wife, which she let the husband have, "and which he used in business, and with which he designed to secure her a home; but respondent did not then expect that anyone would question the same, and he was not particular to express the real consideration of the deed. He then goes on to deny that he was in failing circumstances, or indebted to complainant when the deed was made, and insisted that he had property outside of this conveyance to the wife, of more than three times the value of all his indebtedness.

We find, after examination of the facts in the record, that the conveyance to the wife must be held voluntary, and think it clear that Hooke was not in condition to make such a conveyance. It is probably true, that upon his estimate of the value of his property in October, 1873, it might have paid his debts, and left a surplus; but we know that estimates of value of property at that period proved illusory in most cases, and the result in this case shows it was certainly so. The whole property not covered by mortgage or liens seems to have been absorbed by debts before March, 1875, and the debts now to be enforced will, we suspect, scarcely be paid by its proceeds. The conveyance to the wife cannot be supported as against creditors.

It is insisted, however, that in any aspect of the case, the right of homestead shall be allowed, the wife not having joined in any deed conveying this right, in which she has been privily examined, as is required by our Code, § 2114.

It has been held by this court, in the case of *Cowan v. Johnson*, Com. Rep., October 11, 1876, that where the wife joined in a conveyance to a third party, and such party then conveyed to her, said conveyance having been fraudulent, she had lost the right of homestead.

Without discussing the correctness of that decision, resting as it does perhaps on an estoppel on her part, or it may be on the ground

of active participation in attempted fraud by the wife, we distinguish this case from that, on the ground that the wife has not participated in any fraud. There is but fraud in law, growing out of a gift by the husband to the wife, which he was unable to make by reason of his indebtedness. The wife simply accepted the bounty, or did not dissent. On what principle it can be held that the homestead right secured by the Constitution of 1870 not only to the head of the family exempt from sale under legal process during his life, but which enures to the benefit of the widow and the children during minority, is held to be forfeited in favor of the creditor, by a voluntary conveyance made to the wife, we are unable to see.

The conveyance made to the wife, is void as to creditors, and is set aside, as to the right of the creditor existent at the time of the conveyance, so that the creditor stands as if it did not exist. This is clear. But how the creditor stands any higher, or acquires an additional right by setting aside the conveyance, beyond what he had before it was made, it is difficult to see. Before the conveyance he could sell the property of his debtor, subject to the homestead, but the wife was entitled to the homestead, and it could not be sold by legal process. You set aside a conveyance to her, as voluntary, and by that legal process you sell the homestead, and deprive her of it, in the teeth of the Constitution and the law. It is thus alienated by legal process or proceeding, when the Constitution says, "nor shall said property be alienated without the joint consent of husband and wife, where that relation exists, and that to be evidenced, under the statute made to carry out the constitutional provision, by conveyance duly executed as required by law for married women."

In the face of this we must hold it may and shall be subject to be sold by legal process, and be alienated without conveyance by the wife, executed as required by law for married women.

The husband makes a voluntary deed to the wife, which is void because he is indebted and therefore must be just before he is generous. His creditors have prior claim protected by law, but that claim does not reach or attach to the homestead, on the contrary it is expressly excluded. You set aside the conveyance as against this creditor's right, and enforce the right he had before it was made, and lo, by some magic, that right is enlarged so that it embraces and swallows up the homestead. So that the creditor, so far from being injured, obtains a benefit he did not before have, and obtains a right not before enjoyed. How this can be done, or worked out, is what

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we are unable to see. The conveyance is void as to creditors, but good as against the homestead, so far as to defeat the right of the wife to it, and give the creditor the right to appropriate it to his debt, which right is not conveyed or stipulated for in the deed to her, nor bargained for by the creditor. We do not think this is sustained either by reason or authority.

We therefore hold, that this deed of gift to the wife, though voluntary and void as to creditors, does not defeat the homestead right, nor enlarge in any way the right of the creditors, as they existed before it was made.

The decree will be modified to this extent. Costs of this court will be paid, one-half by complainant, the other by Hooke and wife.

NOTE BY THE REPORTER. — The same conclusion was reached, by a divided court, in *Boynton v. McNeal*, 31 Gratt. 456. The court, STAPLES, J., said:

"The question is substantially the same as that which arose in *Shipe v. Repass*, decided at Wytheville, and reported in 28 Gratt. 716, 729. It was there held, by a majority in a court of three judges, that when a conveyance is set aside for fraud at the suit of the grantor's creditors, he is not estopped as against them to assert his claim of homestead in the property embraced in the deed. At the time that decision was made, the court had access to but few of the authorities bearing upon the question. A reference to the opinion will show the grounds upon which it was based, and it is not proposed to repeat them here.

"Since the present case has been under consideration, I have taken occasion to re-examine the whole subject, and to look more fully into the authorities, and I find no reason to doubt the correctness of the former decision. In Thompson on Homestead and Exemptions, the most recent work on the subject, the cases are collected, and the question carefully considered on reason and authority. I propose to quote somewhat extensively what he has said, as my own argument in the present case. After stating the rule in question, he proceeds as follows:

"The reasons for this rule may be deduced from the cases: First, that the homestead privilege is created for the benefit of the wife and children, as well as that of the husband and father; therefore it is not right that the former should be prejudiced by the wrongful act of the latter; second, that the conveyance being void as to creditors, it stands as to them as though it had never been made. If it had not been made, the debtor (or his wife) could have asserted the right of homestead in the premises against them, and they, the creditors, cannot assume the inconsistent positions of asserting the nullity of the conveyance, and claiming a right under it. In other words, a fraudulent conveyance does not enlarge the rights of creditors, but leaves them to enforce the rights they would have had if no such conveyance had been made. Expressed in still another way — the interest which the creditor has in the property by virtue of his lien is a *derivative interest*, proceeding from the debtor and dependent upon his title. Hence the creditor cannot acquire a right under the debtor's title, and at the same time impeach that title. He cannot sell under his execution the debtor's title, and at the same time deny the debtor's right of homestead on the ground that the latter has no title. By attempting the sale the creditor affirms that the debtor has a salable interest, and the law means that interest should not be taken away and the debtor disturbed in his possession by judicial process. When the law declares that a debtor's disposal of his property with intent to defraud his creditors shall be voidable at the instance of his creditor, and at the same time declares that specific property of the debtor shall be exempt as against his creditor's adverse claims, the provisions are *in pari materia*, and must be construed together, and the latter provision must be held to except this exempt property from the operation of the former provision. Certainly it would be very inconsistent to say that a debtor's disposal of his property, and which property, in so far as the creditor and his claims are concerned, may be said to have no existence at all, is a fraud upon the creditor. No creditor can be, in legal contemplation, defrauded by a mere conveyance made by his debtor of

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any of his property which such creditor has no right by law to appropriate, or even to touch by any civil process. A conveyance of the homestead by the husband to the wife cannot be held fraudulent as to creditors, for the reason that being exempt it was no more beyond their reach than before.'

"To my mind, this reasoning is not only just and sound, but is absolutely unanswerable. There is much more on the same subject in the same work, but the limits of this opinion will not justify further citation. It will be seen, however, that one of the reasons given by the author for the rule stated is, that the creditor cannot be said to be hindered or delayed, or prejudiced by a fraudulent conveyance embracing property subject to the homestead, because the debtor is entitled to hold it exempt from the payment of his debts. A striking illustration of this principle is furnished by the cases respecting property exempt from execution at law. According to the course of English decisions, it was long settled that, to make a voluntary conveyance void as to creditors, it must transfer property which would be liable to be taken in execution for the payment of debts. The reasoning upon which this doctrine was based was, that the statute of frauds and perjuries was not intended to enlarge the remedies of creditors or to subject any property to execution not already in law or equity, subject to the demands of creditors. A voluntary conveyance of property not so subject would not be injurious to them nor within the purview of the statute, because it would not withdraw any fund from the power of the creditor which the law had not already withdrawn from it. And it would be a strange anomaly to declare that to be a fraud upon creditors which in no respect varied their rights or remedies. And hence it has been held that a voluntary settlement of stock or of any other property not liable to execution is valid, whatever may be the condition of the grantor. This is the doctrine held by some of the most eminent judges in England. 1 Story Eq. Pl. §§ 367, 368. It is true that Chancellor KENT and other American jurists have very justly questioned its soundness upon the ground, that although property thus conveyed could not be reached at law, equity might interfere and give the necessary relief; for otherwise a debtor might convert all his property into stock, and settle it upon his family, in defiance of the claims of his creditors. But neither Chancellor KENT nor any other American judge, in discussing this question, ever maintained that a fraudulent or voluntary conveyance enlarged the rights of the creditor, or that he would be prejudiced by a conveyance of property which is exempt both at law and in equity from the payment of debts. Take, for example, the property exempt from levy and distress under what is known as the poor-debtor's law. It will scarcely be maintained that if the debtor should make a fraudulent deed conveying this property along with other property subject to his debts, he would thereby forfeit his claim to exemption as against the creditors.

"The language of the Constitution is equally emphatic with respect to the homestead. It declares that every householder or head of a family shall be entitled, in addition to the articles now exempt from levy or distress for rent, to hold exempt from levy, seizure, sale under execution order or other process, his real and personal property, etc., to the value not exceeding \$3,000, to be selected by him.

"It is said, however, that by the express terms of this provision the debtor can only claim the homestead in property which is his own, and not in that which is another's. The Supreme Court of Ohio in *Sears v. Hanks*, 14 Ohio St. 298, has given so complete an answer to this question, I will content myself with quoting a part of Judge SCOTT's opinion in that case: 'Although estoppels are mutual, the plaintiffs claim a right, notwithstanding the conveyance, to regard the property as still belonging to the debtor, and at the same time disregarding the decree which they have asked and obtained, to insist that their debtor has no interest whatever in the premises. The debtor is estopped equally from claiming and from disclaiming, while the creditor may do either, and each in turn, as his interest may dictate. Such a position can hardly be maintained. The rights of the plaintiffs in this action are only those which belong to creditors seeking to set aside a voluntary conveyance of their debtor made in fraud of their rights, and to enforce their judgment liens against the property so conveyed. Their claim is not under or through the fraudulent conveyance, but adverse to it, and when at their suit it has been set aside and declared wholly void as against them, they cannot be allowed as creditors to set up this void conveyance, against which they are claiming, for the purpose of enlarging their rights or remedies against their debtor, or for the purpose of estopping him from the assertion of the rights which he would otherwise have as against them. As between creditor and debtor, the deed is simply void, and cannot, therefore, affect the rights of either

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A judgment creditor's lien is only upon the property of his debtor, and the purchaser at a sale on execution takes in general only the debtor's title. If the debtor has no title or interest in the property levied on, there is nothing for the creditor to sell, and it is not competent for the creditor while selling the alleged title of his debtor to deny his right to a homestead on the ground that he has no interest in the property about to be sold. If he has an interest in the homestead property which the creditor can sell, he has an interest enough to secure his homestead from sale. The validity of the fraudulent conveyance as between the parties to it is no concern of the creditor's when it has been set aside as to him. All he can ask is, that against him it shall confer no rights upon any one. Were these plaintiffs judgment creditors of the fraudulent grantee, and levying their execution as such, the case would have been entirely different, and it might then well be said, in response to the present claim of Hanks, the creditor, that one person cannot have a homestead in the property of another.'

"I might also quote a very clear and satisfactory argument of Judge DILLON in *Oben v. Wilder*, 3 Dill. 45, 49, and of the Supreme Court, of Wisconsin, 11 Wisc. 114, to the same effect; but the citations already given contain all that is necessary upon this particular point.

"All that has been said relates, of course, to a controversy between the debtor and creditor exclusively. The deed being valid between the parties, no claim or assignment of homestead can affect the rights of the fraudulent grantee. But if he raises no objection, if he does not rely upon the estoppel, and the controversy is narrowed to a contention between debtor and creditor, I can see nothing to preclude the former as against the latter from asserting his claim of homestead.

"We have heard much of a sound 'public policy,' which requires the courts to intervene for the suppression of fraud; all of which is well enough as a guide for judicial discretion when properly understood and defined. But what is 'public policy?' As a basis of judicial decision it is wholly unreliable. In *Licenses Cases*, 5 Wall. 462, the Supreme Court of the United States has said: 'This court can know nothing of the public policy except from the Constitution and laws, and the course of administration and decision. It has no legislative powers. It cannot amend or modify any legislative acts. It cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must in general be addressed to the legislature. Questions of policy determined there are concluded everywhere.'

"It is idle to say a man cannot take advantage of his own fraud. How is he taking advantage of his fraud in claiming property not subject to his debts? Now, if the attempted fraud of the debtor is in all cases to defeat the homestead, the result will simply be to give to the creditor a profit out of the transaction at the expense of the family of the debtor, for whose benefit the exception is mainly intended. And it becomes a grave question to be considered how far 'public policy' requires that the family of the debtor shall be punished for his misconduct.

"But why do we look only to cases of actual fraud? Instances of constructive fraud are much more numerous, and more frequently the subject of judicial investigation. Many a man, whose actual indebtedness bears but a small proportion to his property, makes a settlement upon his wife or children, and afterwards spends or loses so much of his estate as not to leave enough to discharge his debts. No one doubts that a settlement of this sort may be made with a perfectly honest intent, and yet the law pronounces it fraudulent, and it will be set aside at the suit of the creditors. The case of *Johnston v. Gill*, 27 Gratt. 587, is just such a case. The books abound with other of a similar character, in which there is not a whisper of actual fraud. And yet according to the reasoning of those who advocate a 'sound public policy,' the settlement defeats the homestead and confers upon the creditor rights he would not have had without the settlement. In this very case there is no reason to suppose any actual fraud was intended. All the circumstances rebut any such conclusion. At the time the deed was executed the indebtedness of the appellant did not exceed \$500; there were no liens upon the property, nor have any been since acquired, except such as resulted from the mere filing the bill. If the appellant, instead of conveying the property for the benefit of his wife, had filed his claim of homestead, the result would have been nearly the same, and the transaction would have been entirely legitimate. But it seems that in this particular case the *form* of the investment stamps the transaction as fraudulent; the wife loses the benefit of the provision made for her, the husband forfeits the homestead, and the creditor acquires title under a deed to a third person, which is a nullity as to him. A course of reasoning which leads to such results must be radically wrong and vicious. It cannot receive the sanction of my support. I know that cases will sometimes occur in which

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the deed is tainted with actual fraud. If in such cases it is deemed advisable to deprive the debtor of the homestead for the benefit of the creditor, the legislature can apply the remedy under such limitations as may be needful and proper. Whatever may be said with respect to the general policy of these homestead provisions, as long as they remain it is the duty of the courts to sustain them liberally by the express mandate of the Constitution.

"In conclusion, I will state that the views here expressed are fully sustained by the decisions of the Supreme Courts of Mississippi, Alabama, Louisiana, Kentucky, North Carolina, Massachusetts, Maine, Vermont, New Hampshire, Iowa, Michigan, Wisconsin, Texas and Missouri; by the opinion of Judge DILLON, in *Oax v. Wilder*, 2 Dill. 45, and the opinion of Judge HARKINS in *McFarland v. Goodman*, 6 Biss. 111, and by the several authors who have treated the subject. See Smyth on Homestead and Exemptions, § 532; Thompson on Homestead and Exemptions, §§ 406-408; and Bump on Fraudulent Conveyances, where all the cases are cited.

"There are some opposing decisions, I admit, but they will be found generally to relate to conveyances of chattels as affected by particular statutes of the several States. Thompson, § 425 *et seq.* The case of *Brackett v. Watkins*, 31 Wend. 68, relied upon in the dissenting opinion in the Wytheville case, it seems has been overruled in New York by *Wilcox v. Hawley*, 31 N. Y. 649. It would seem, also, that the case of *Mandlow v. Burton*, 1 Ind. 33, also cited in the same opinion, if not overruled, was certainly not followed in the subsequent case of *Vandiver v. Love*, 10 Ind. 54; Thompson, § 429.

"The Pennsylvania cases proceed upon the ground that the exemption laws of that State were intended for honest men, and not for cheats and rogues — words interpolated into the statute by the honorable court. Upon the same principle I do not see why in every case upon an application for a homestead an issue should not be directed to determine whether the applicant is an honest man. According to my understanding, these exemptions are allowed without reference to the merit or demerit of the debtor. They are founded upon a policy that has no relation to the character or conduct of the parties claiming the benefit of them. Neither our Constitution nor our statutes make any such exception, and without at all concurring in the observation that every man is a cheat and a rogue who makes a conveyance invalid as to his creditors, until the legislature thinks proper to interpose I shall be content to follow the authorities which hold that such a conveyance as to them (the creditors) at least does not divest the debtor of his right to a homestead. My opinion, therefore, is that the decree of the Corporation Court is erroneous, and must be reversed and remanded for further proceedings in conformity with the views here expressed.

MONCURE, P., and ANDERSON, J., concurred. CHRISTIAN and BURKS, JJ., dissented.

JOHNSON V. STATE.

(3 Lea, 469.)

Statute — repeal of — effect upon liquor licenses valid before repeal.

A statute prohibited the sale of intoxicating liquors within four miles of any incorporated institution of learning, except within incorporated towns. The defendant had a license to sell in a town in which there was such an institution. The charter of the town being repealed, *held*, that the defendant was liable to prosecution under the statute.*

CONVICTION of unlawfully selling intoxicating liquors. The opinion states the facts.

* Compare *Dowson v. People* (40 Mich. 431), 22 Am. Rep. 545.

Johnson v. State.

J. J. Turner, for Johnson.

Attorney-General Lea, for the State.

FREEMAN, J. The defendant was presented by the grand jury of Trousdale county for unlawfully selling and tippling intoxicating liquors on the 1st of May, 1879, within four miles of an incorporated institution of learning in the town of Hartsville, in said county, the said selling not being within an incorporated town. He was found guilty under the instructions given to the jury by the court, and has appealed in error to this court for a reversal of the judgment.

The statute under which the party was convicted is highly penal in its provisions, the jury fixing the defendant's fine at \$100, and imprisonment in the county jail for one month. The case, as presented in the agreed facts, is as follows:

The defendant had been in this business for a number of years in the town of Hartsville, obtaining license from the County Court clerk, as required by law, taking his license uniformly for the term of three months. On the 11th day of March, 1879, the firm of which defendant is a member took out a license for twelve months, which was duly and legally issued to them upon payment of \$150, State and county tax for the privilege thus granted. It may be remarked here that the terms of the license granted are "to keep a tippling-house at any one place in Trousdale county" for the period specified. Bond and security was also required by law in the sum of \$500, that the parties are to keep an orderly house, and in all things conform to the requirements of the statute under which the license was granted, which is an act "to tax and regulate tippling and tippling-houses, and to increase the revenue."

At the date of the issuance of the above license, the town of Hartsville was an incorporated town, and had been since 1858. The institution of learning situated in or near said town had been incorporated in 1856. The charter of the town of Hartsville was repealed March 28, 1879, and the inhabitants permitted, if they choose, to accept the benefits of the "taxing district" system inaugurated by the last legislature, but the agreed case shows they have not done so.

By the act of assembly of March 20, 1877, it was made a misdemeanor to sell or tipple spirituous liquors within four miles of an incorporated institution of learning in this State, under penalty of not less than one hundred nor more than two hundred and fifty dol-

lars, and imprisonment not less than one nor more than six months. But the second section of this act excepted from its application the sale of such liquors within the limits of any incorporated town, and also to sales made by persons having license to make the same at the passage of said act, during the time for which such license was granted. It has been urged that we should hold the exception in the above statute in favor of existing rights under licenses granted, and should protect the defendant in this case. But the language of the act is definite, that only such licenses as were owned by persons at the date of that act, to wit, March 19, 1879, are excepted. The case then is that there has been a sale of spirituous liquors within four miles of an incorporated institution of learning not within an incorporated town. Nothing more appearing, the party is clearly guilty under the act of 1877, under which he was convicted. He defends, however, under the license issued and paid for March 11, 1879, authorizing him to tipple in consideration of \$150, State and county tax, paid to the State, under a law of the State authorizing such license. The terms of this license, as we have said, are that the party is authorized to "keep a tippling-house at any one place in Trousdale county" for twelve months from the date of its issuance. It is claimed that this license gives immunity for twelve months to keep a tippling-house in the town of Hartsville, it being the place of business of the parties at the time, and being lawful to do so at the time, because the town was then an incorporated town, and liquor might be sold within its limits, notwithstanding the proximity of an incorporated institution of learning; that the license is a contract to be allowed to sell for the twelve months, the obligation of which cannot be impaired, and that the repeal of the charter exposing the parties to the penalties was such an impairment, if they are now held subject to the penalties of the statute.

We do not deem it necessary to give a definite decision of the question whether such license is a contract protected by the immunities in favor of the right thus secured under the Constitution of the United States and of our own State. The terms of the license and the grant of the privilege are expressed in very general terms, it is true, and if literally construed, might be held to include the right to sell anywhere within the limits of the county, subject to no restriction, control or regulation. But this would not be a fair construction of what was intended, even assuming it to be a contract in the fullest sense of the term. We take it that the fair meaning is that the

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party is to enjoy the exercise of the privilege granted, subject to such reasonable police regulations as may be deemed necessary for the protection of the community. That it shall be held and enjoyed in the same way as other rights secured by the Constitution and laws of our State. For instance, a man has the right to own a horse, it is his property, and he may use him, in a reasonable way, as he pleases, but not to the detriment of his neighbors' rights, nor the disturbance of the community, as by riding into a public assembly, or taking him into a church. He can ride his horse as rapidly as he chooses, as a general rule, but as we have held, he cannot run him along a public road at the peril of doing an injury to other persons equally entitled to the use of the highway with himself. So under this license the party could tipple, but not on election days, nor within a mile of a religious meeting, and the like restrictions found in our statute book.

In view of the importance of the police powers to the well-being of the State, it ought not to be held that its reasonable exercise for the regulation of the enjoyment of even well-defined rights, is in any way an infringement on the rights of any member of the community, except where the violation of that right is clear and unmistakable. In this view of the question we hold that while the party here may be conceded to have the privilege to tipple in the county of Troups for the period of twelve months, the regulation that he shall not do so within four miles of an incorporated institution of learning is but a reasonable regulation, and one to which his right may be well subjected without impairing in any fair legal sense the enjoyment of the privilege granted. In other words, that he takes the privilege, and may enjoy it, subject to the paramount right of the State to protect the community from evils incident to its exercise. He may well enjoy the privilege of tipping in the county of Troups, and at the same time the State may well provide for the protection of her youth from the baneful influences of his traffic while engaged in the acquisition of an education, in many cases away from home and the watchful oversight of parents and guardians. This does not abrogate his license, but leaves it in full force — only regulates its exercise for the general good. It could not be maintained in any aspect of the question that the grant of the privilege to tipple, which might at the time be exercised within incorporated towns, irrespective of their proximity to institutions of learning, necessarily included the right to do so should the town cease to be incorporated, nor could it be held that the legislature was precluded from

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repealing the charter of incorporation of any town, or if it did so that all the results of such a repeal should not follow in order to the protection of parties in the exercise of the right to tipple under a license. The right granted may be exercised with ample freedom in this case in the county of Trousdale, without the violation of any law, by simply engaging in the business within an incorporated town, or farther than four miles from an incorporated institution of learning. For these reasons we hold the view of his honor, the circuit judge, correct, and that the conviction of the party was properly had, independent of the question whether his licensed privilege be a contract or not.

On that question we find the decision of our courts conflicting, and not very satisfactory, to say the least of them. In New York and Massachusetts it has been held that a license granted has not the elements of a contract and protected as such, while in New Hampshire, Alabama and New Jersey the contrary has been held. *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Calder v. Kirby*, 5 Gray, 597; *Commonwealth v. Brennan*, 103 Mass. 70; *Adams v. Hackett*, 7 Fost. 289; *State v. Phalen*, 3 Harr. 441; *Boyd v. State*, 46 Ala. 329.

On this question we express no opinion, deeming the view we have taken conclusive of the case and satisfactory. It will be time enough to decide the question of contract when it is fairly presented.

Let the judgment be affirmed.

WILLIAMSON V. STEELE.

(3 Lea, 527.)

Sale — of growing crop as against execution creditor.

In consideration of supplies, A, by a written instrument, not recorded, sold to B so much of a growing crop of cotton as would be sufficient to make two bales of lint cotton, each weighing not less than 500 pounds, the same to be gathered, prepared for market and delivered by the first of the next December. C, an execution creditor, levied on seed cotton in a pen, part of the crop, before the first of December. *Held*, that C's levy had preference, although A before the levy, intended to gin, bale and deliver that particular cotton to B.

REPLEVIN. The opinion states the facts. The defendant had judgment below.

* See *Moore v. Byrum* (10 S. C. 452), 30 Am. Rep. 53, and note, 62.

Williamson v. Steele.

W. H. McCallum, for Williamson.

Jones & Steele, for Steele.

COOPER, J. Action of replevin for two bales of cotton, brought by Williamson against the officer who had levied an execution in favor of Steele on the cotton. Steele was substituted as defendant in place of the officer. The case was tried by the judge, without a jury, who rendered judgment for the defendant, and the plaintiff appealed in error.

The cotton was raised by Hays and Puryear in 1879. On the 15th of November, 1879, the cotton being then in a pen and unginned, it was levied on by a valid execution in favor of Steele against Hays and Puryear.

On the 17th of November, 1879, the writ of replevin was sued out. The plaintiff claims under a written instrument executed by Hays and Puryear on the 4th of June, 1879, duly proved and registered on the twenty-second of July of that year. By this instrument the grantors say they "have this day bargained and sold and do hereby convey" to G. T. Williamson "so much of the cotton crop" now being raised on their farm, describing it, "as will be sufficient to make two bales of lint cotton, each weighing not less than five hundred pounds; the same to be gathered and prepared for market by us, and delivered to the said G. T. Williamson by the first day of December next." It is then recited that the conveyance is made in consideration that Williamson "has already and is in the future to furnish" the grantors with supplies to make the crop then growing, the supplies not to exceed seventy-five dollars. "Now, if we do not pay said Williamson for said supplies by the first of December, then said Williamson is to sell said cotton for the best price he can obtain, and out of the same pay first the expense of this trust, and next for said supplies, and the balance to us."

It was agreed by the parties that Hays and Puryear raised on the farm seven bales of cotton, five of which were prepared for market and sold by them without the knowledge of the plaintiff. There was left 3,220 pounds of seed cotton in a pen, being the cotton levied on, and 300 pounds ungathered in the field. The seed cotton in the pen would about make two bales of 500 pounds each, and Hays and Puryear intended to have it ginned, made into two bales, and delivered to Williamson, but they did not communicate this design to Williamson, or inform Steele thereof until after the levy.

The owner of a growing crop may make a valid conveyance of it in mortgage, which, if registered, will be good against creditors. *Butler v. Hill*, 1 Baxt. 375. A similar conveyance of a definite part of the crop would, no doubt, be equally valid *pro tanto*. The difficulty in this case is that the instrument relied on does not convey any particular or aliquot part of the crop, as one-half, one-fourth, or the like, nor even a specific portion, in pounds or bales, so designated as to pass, by the terms used, at once to the grantee. *Thurman v. Jenkins*, 2 Baxt. 426. It conveys, it is true, so much of the cotton crop as will make two bales of lint cotton, each weighing not less than 500 pounds, but does not so specify the part intended to be conveyed as to pass the title. The rule of law requires such a description, either general or special, of the property sought to be mortgaged, as will enable anyone to take the deed, and from its face to designate the property described. *Overton v. Holinshade*, 5 Heisk. 683. This may be done where a definite although undivided share is conveyed, for the grantee takes title to the extent of the interest in every part of the property. Nor would the rights of the grantee in such case be prejudiced by a provision that the share was "to be gathered, prepared for market, and delivered" by the grantor to the grantee, for it would only amount to a stipulation for so much work on the crop, and the delivery would be of that to which the title had already passed. But where only a certain quantity of articles of the same character, such as cattle, grain in bulk, or a particular crop, is undertaken to be conveyed, no title can pass until the quantity is selected and set apart; until selection made, the whole property would be subject to execution by the grantor's creditors. For what is sold is not separated from that which is not sold, and the grantee has no title in any particular property for which he could bring an action. *Sugg v. Tillman*, 2 Swan, 208; *Farquharson v. McDonald*, 2 Heisk. 404, 416. The grantee, under the deed before us, has no right to select any particular part of the cotton raised to the extent of the quantity necessary to make two bales, and assert title thereto as against the grantor's creditors acquiring liens on the crop. If he could do so as to the seed cotton levied on by the defendant, he could equally select his two bales from the five previously sold. His right would be ambulatory to suit his convenience or his caprice. The selection is left to the grantors by whom the prescribed quantity is to be "gathered, prepared for market and delivered." It is the fact that no title passed, or could possibly pass,

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to any of the cotton until designated by the selection of the grantors, that gives the creditor the better right. The contract embodied in the instrument was legal, and a selection and setting apart of the property for the grantee by the grantors, before levy, would have perfected the grantee's right in equity. *Langton v. Horton*, 1 Hare, 549; *Phelps v. Murray*, 2 Tenn. Ch. 750; *Grimes v. Rose*, 24 Mich. 416. The intention of the grantors to have the seed cotton, which was levied on, ginned, made into bales, and delivered, cannot supply the place of the act. The will is not equivalent to the deed, where the rights of third persons are concerned.

The judgment will be affirmed.

JACKSON V. RUTLEDGE.

(3 Lea, 626.)

Marriage — married woman — conveyance to, subject to vendor's lien.

A married woman, accepting a conveyance of land to her separate use, reserving a lien for unpaid part purchase-money, is bound by the conveyance, and cannot recover her payments, and the lien may be enforced.*

BILL to enforce a vendor's lien. The opinion states the case. The complainant had a decree below.

W. H. McCallum, for complainant.

N. Smithson and *J. S. Wilkes*, for defendants.

COOPER, J. On the 13th of October, 1874, Fannie W. Rutledge, then and now a married woman, bought from J. H. Crenshaw a tract of land at the price of \$3,144.60. She paid him in cash \$1,500, being money collected from her late guardian by suit in the Chancery Court, and paid to her in person under orders of that court. She gave Crenshaw her two notes for \$822.30 each, payable respectively on the 25th of December, 1876 and 1877. These notes were indorsed to the complainant, R. A. F. Jackson, for value, before maturity. Crenshaw had bought the land from D. L. Gordon, and paid him

* To same effect, *Cushman v. Henry*, ante, p. 437.

therefor, but the legal title was still in Gordon. At the request of Crenshaw, Gordon made the conveyance by deed in fee direct to Fannie W. Rutledge, to her sole and separate use, reciting the consideration passing from her to Crenshaw, and retaining a lien on the land for the payment of the two notes given for the purchase-money. Rutledge and wife went into possession of the land.

On the 15th of November, 1877, Jackson filed the original bill in this cause against Fannie W. Rutledge and W. W. Rutledge, her husband, to enforce the lien reserved on the land for the payment of the purchase notes. The husband and wife answered jointly, admitting the sale and purchase of the land and execution of the notes as above stated. They suggest that Gordon's title to the land is defective, and insist that the notes and the contract of purchase were void, because of the coverture of the defendant, Fannie, at the time. On the 2d of September, 1878, Rutledge and wife filed a bill, in the nature of a cross-bill, against Jackson, Crenshaw and Gordon, restating the facts as above, and asking for relief upon the ground of a defect of title, and that the contract of purchase was void for the reason just stated. The defendants to this bill filed a joint answer, in which they set out the facts touching Gordon's title to the land, and resist the relief sought. An agreed statement of facts was afterwards drawn up by the parties, upon which and the pleadings the cause was heard by the chancellor, who sustained the validity of the conveyance and subjected the land to the satisfaction of the unpaid purchase-money under the lien reserved in the deed. He gave no personal decree against either the husband or wife. Rutledge and wife appealed.

It is conceded that the title to the land is good, and that Jackson, by the admission of Crenshaw and Gordon, is entitled to the unpaid purchase-money, if it can be collected. The case turns, therefore, upon the point whether the lien reserved in the deed can be enforced. The counsel for the married woman insist that the sale and conveyance are void by reason of their client's coverture at the time they were made, and as a consequence, that she should have a decree against Crenshaw and Gordon for the money paid, which should also be declared a lien on the land, and that she should recover the value of permanent improvements, subject to an account for rents since she has been in possession.

"As to personal estate," says Lord HARDWICKE, "undoubtedly, where there is an agreement that the wife shall have to her separate

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use either the whole or particular parts, she may dispose of it, though nothing is said of the manner of disposing of it." *Peacock v. Monk*, 2 Ves., Sr. 191. "I have always thought it settled," says Lord THURLOW, citing *Peacock v. Monk*, and a very old case in Tothill, "that from the moment in which a woman takes personal property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it." *Fettiplace v. Gorges*, 1 Ves., Jr. 46; *S. C.*, 3 Bro. C. C. 8. Since this decision, the power of a married woman to dispose of money or personal effects held to her separate use, where there is no restraint upon her power of disposition in the settlements, has been universally conceded. Our decisions are in accord. *Prewet v. Looney*, 8 Yerg. 63; *Porter v. Baldwin*, 7 Humph. 175; *Martin v. Olliver*, 9 id. 566; *Powell v. Powell*, id. 477; *Cox v. Scott*, Memp. L. J. 248. So, of the rents and profits of her separate realty. *Young v. Jones*, 9 Humph. 551; *Bottoms v. Corley*, 5 Heisk. 11; *Ordway v. Bright*, 7 id. 681; *Cheever v. Wilson*, 9 Wall. 119. A married woman may, with separate means, or by the proceeds of property in which she has an interest, purchase property, personal or real, from her husband or a third person, and have it settled to her separate use. *Livingston v. Livingston*, 1 Johns. Ch. 537; *Lady Arundell v. Phipps*, 10 Ves. 139; *Liles v. Fleming*, 1 Dev. Eq. 185; *Pritchard v. Wallace*, 4 Sneed, 405; *Ready v. Bragg*, 1 Head, 512; *McClure v. Doak*, 6 Baxt. 368; *Turbox v. Tonder*, 1 Tenn. Ch. 164.

It is true the common-law incapacity of a married woman to contract is fully recognized in this State. *Catron v. Warren*, 1 Cold. 358; *Kirby v. Miller*, 4 id. 3. She cannot, therefore, make a valid promissory note. *Sheppard v. Kindle*, 3 Humph. 80. She can only bind her separate estate, within the power conferred, by an express agreement and in the contract if in writing. *Cherry v. Clements*, 10 Humph. 552; *Ragsdale v. Gossett*, 2 Lea, 730. And any decree for specific performance can only be *in rem* against the specific property, not *in personam* against the married woman. *Aylett v. Ashton*, 1 M. & C. 105; *Francis v. Wigzell*, 1 Mad. 258; *Young v. Paul*, 2 Stockt. 401; *Chatterton v. Young*, 2 Tenn. Ch. 771.

By reason of the personal incapacity of a married woman to contract, she cannot make an executory agreement to purchase land on credit, and pay the purchase-money by installments. It would be optional with her whether she would comply with her contract, or interpose her coverture in bar of the recovery of the money, or of a specific performance. *Morrison v. Kinstra*, 55 Miss. 71. So, where

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a conveyance has been made to a married woman, though not to her separate use, and she has reconveyed in mortgage to secure the purchase-money, the mortgage is of no legal validity. *Concord Bank v. Bellis*, 10 Cush. 276; *Eaton v. George*, 40 N. H. 258. But even in such cases, equity has interposed by compelling the husband and wife, where the husband has thereby acquired an interest, to make a valid mortgage to secure the price, *Leach v. Noyes*, 45 N. H. 364, or has upheld the mortgage as creating an equitable lien. *Hatch v. Morris*, 3 Edw. 313. Mr. Bishop's comment on the relative rights of the parties in such cases is this: "In a court of law, the conveyance to the wife must be held good, at least as between the parties; because, though the mortgage being void, no consideration passed to the grantor for the conveyance, yet it was what he consented to receive, and a voluntary conveyance is at law sufficient to pass the estate. In equity, on the other hand, the grantee would be held to be a trustee for the grantor by reason of the failure of what was really contemplated between the parties as a consideration." 1 Bish. Mar. Wom. § 600.

If the conveyance be to the sole and separate use of the married woman, there seems to be no difficulty in treating a debt contracted in the purchase as binding on the property, although not personally obligatory on the *feme*, because where she takes possession under the conveyance, the debt is contracted for the benefit of her separate estate. It was so hold in *Ballin v. Dillaye*, 37 N. Y. 35, 39, a decision of weight upon principle, the statutes of New York at that time, as the opinion shows, not having done away with the common-law disability of a married woman to contract. See also *Yale v. Declerer*, 22 N. Y. 450. So, where the husband or a third person buys the land, and causes the conveyance to be made to the wife to her sole and separate use, there is no difficulty in enforcing against the land the vendor's lien for the unpaid purchase-money. *Upshaw v. Hargrove*, 6 Sm. & M. 291; *Doyle v. Orr*, 51 Miss. 229. And all the cases agree that the contract between a married woman and a third person for the purchase by the former from the latter, is not void or voidable merely because the married woman is not bound. *Concord Bank v. Bellis*, 10 Cush. 276; *Catron v. Warren*, 1 Cold. 358. At any rate, to use the language of BECK, J., in an Iowa case: "If it appears certain that a party contracting with a married woman will not suffer on account of her disability, as in the case where she has performed her obligation, or has done that which is the consid-

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eration for the promise of the other party, or when the "consideration is secured to him." *Chamberlin v. Robertson*, 31 Iowa, 408, 414.

If, now, we have a married woman with money which she may use in purchasing land, an actual purchase and conveyance of the land to her sole and separate use, capacity in her to purchase and take by grant, and the consideration secured to the vendor without reference to the personal liability of the *feme*, we have, under the foregoing principles and decisions, all the elements of a valid trade. Her incapacity to execute valid notes, if we treat the purchase notes as void on that ground and because not expressly made obligatory on her separate estate, would not affect the vendor's right to subject the land to the satisfaction of the unpaid purchase-money by virtue of the vendor's equity and of the lien reserved. By the delivery and acceptance of the deed of conveyance, the contract was executed and the title vested in her. She takes the title subject to the charge created by the terms of the deed. *Trezevant v. Bettis*, 1 Leg. Rep. 48; *Lee v. Newman*, 1 Memp. L. J. 139; *Eskridge v. Eskridge*, 51 Miss. 522.

Under such circumstances, the married woman is not entitled to have the cash payment refunded. In making the payment, as we have seen, she exercised a right which the law concedes. Having the money, she might dispose of it, even to her husband, with or without consideration. Her disability, this court has often said, is a shield to defend, not a sword with which to attack. There is not the least ground, in a court of equity, to rescind the purchase, and charge the land with the money paid by her. All she can justly claim is exemption from personal liability.

The land is hers, subject to the payment of the purchase-money by virtue of the vendor's lien, and as Crenshaw and Gordon agree that this money shall go to the original complainant, Jackson, no difficulty arises out of the fact that the notes are invalid as notes. The same conclusion has been reached, and that too after decisions to the contrary, in a precisely similar case, by the Supreme Court of Mississippi, the clear and satisfactory opinion being delivered by CAMPBELL, J. *Johnson v. Jones*, 51 Miss. 860.

One of the counsel for the married woman calls attention in his brief to the fact that the fund, part of which was used in paying for the land, was settled upon the *feme* by the decree, "subject to her disposition by last will and testament." But this settlement was

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made while the client was an infant, and was intended to enlarge her power, not to restrict it. After she came of age, upon privy examination by the chancellor himself, and formal decree, the fund was paid directly to her, subject only to the settlement to her separate use, and to be invested in realty though not in the particular land.

The pleadings raise no question of the power of the *feme* over the fund, nor probably could any be made so long as the decree, under which it was paid to her, remained in full force.

There is no error in the chancellor's decree, and the same will be affirmed, with costs.

CARTER V. DALE.

(3 Lea, 710.)

Marriage — tenancy by curtesy.

Land was conveyed to a woman for her separate estate, free from the control and liabilities of her husband, and with full power of disposition. *Held*, that, in the absence of words clearly expressing a different purpose, the husband was entitled to his tenancy by curtesy.

BILL for injunction. The opinion states the case.

T. M. Jones, for complainant.

W. H. McCallum, J. S. Wilkes and H. H. Harrison, for defendants.

McFARLAND, J. The only question in this case is, whether Milton A. Carter has a life estate in the land in controversy as tenant by the curtesy. Thomas E. Abernathy conveyed the land to his daughter, the operative words of the deed being to "Mary P. Barber, her heirs and assigns forever." * * * "To have and to hold the same to the said Mary P. Barber, her heirs and assigns forever, and to be her sole and separate estate, and to be free from the control and liabilities of any husband she may hereafter have, with full power to dispose of the same at all times as she deem proper."

Said Mary P. Barber afterwards married Milton A. Carter, by whom she had issue born alive, and died without exercising her power of disposition. The creditors of the husband were proceeding to

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subject his life estate to the payment of their debts, when this bill was filed by the heir asking for an injunction.

It is assumed in argument that the husband cannot be tenant by the curtesy of the separate real estate of his wife. It is true, Judge SNEED says, in delivering the opinion of this court in the case of *Bottoms v. Corley*, 5 Heisk. 6, that this is the settled doctrine of the law. The point, however, did not arise in that case, the only question there being, whether the creditors of the husband could reach the issues and profits of the wife's separate real estate, the husband and wife being then both alive. Judge SNEED refers to several cases in support of his position, particularly *Hearle v. Greenbank*, 3 Atk. 695, and other English cases. His attention seems not to have been called to our own case of *Baker v. Heiskell*, 1 Cold. 642. In that case, by a decree of the Chancery Court, the title of the land was vested in a "trustee, his heirs and assigns," in trust for the sole and separate use and benefit of Eliza Heiskell, her heirs, executors and assigns. The trustee was "to receive for her use and the use of her heirs, etc., all the rents and profits of said land and to pay the same to her and her heirs." She was empowered to declare the uses and trusts for which said trustee shall hold said land by deed or will, but she died without exercising this power. She having had issue born alive, by her husband, Judge CARUTHERS, delivering the opinion of the court, said: "We think the authorities are clear that her surviving husband became tenant by the curtesy of said estate. This, he says, "has always been the law in England and in this country, although the wife was not entitled to dower in the equitable estates of her husband, until the law was changed by the act of 1823, then very properly establishing equality of rights." He adds that the husband's right to curtesy can only be excluded when the intention is clearly expressed. He refers to 4th Kent's Com. The argument of the opinion in *Bottoms v. Corley* is that in case of a separate trust there is not sufficient *seisin* to give the husband curtesy; the wife having the rents and profits of her separate estate, her *seisin* does not enure to the benefit of her husband. See 1 Washb. Real Prop. 151, referring to the cases of *Hearle v. Greenbank*, 3 Atk. 695, and *Sweetapple v. Bindon*, 2 Vern. 536.

Chancellor KENT says: "Though the husband be entitled to his curtesy in a trust estate, it has been a questionable point whether it must not be such a trust estate as to give him an equitable *seisin*. The opinions of Lord HARDWICK in *Hearle v. Greenbank*, and

Roberts v. Dixwell are conflicting and cannot be reconciled; and it would seem to have followed that if the equitable freehold was out in trustees for the separate use of the wife and kept distinct during the coverture from her equitable remainder in fee, that she wanted that *seisin* of the entire equitable estate requisite to a tenancy by the curtesy." "But," he adds, "it is now settled otherwise, and the husband is tenant by the curtesy if the wife has an equitable estate of inheritance, notwithstanding the rents and profits are to be paid to her separate use during the coverture. The receipts of the rents and profits are a sufficient *seisin* of the wife." See 4 Kent, 31, referring to 3 Bro. Ch. 50; *Morgan v. Morgan*, 5 Mad. 248.

This is the authority followed by this court in the case of *Baker v. Heiskell*. More recently the question again came up directly in the case of *Frazer v. Hightower*, 12 Heisk. 94, and the case of *Baker v. Heiskell* was followed, and BURTON, special judge, says it is the settled law in Tennessee. See, also, 1 Wash. on Real Prop. 151, 152.

In the case last referred to, the language of the deed was very similar in its operative words to the present, except that in that case, as in the *Baker and Heiskell* case, there was a trustee, while in the present case the conveyance is direct, and tenancy by the curtesy attaches more certainly to the legal than to the equitable estate; but we do not attach any importance to this difference.

The counsel for the complainant has relied in argument upon the cases of *Hamrico v. Laird*, 10 Yerg. 221; *Loftus v. Penn*, 1 Swan, 448; *Ware v. Sharp*, id. 489, and *Gardenhire v. Hinds*, 1 Head, 405. These were all cases of trust estate in slaves and other personal property and do not raise the direct question. It is true that they involve to some extent the same principle. These all concede that to exclude the right of the husband to take the personal property as administrator, the purpose to exclude him, not only during coverture but after the death of the wife, must be clearly expressed, otherwise he will not be excluded, and in these cases language was used in the instrument of settlement which the court held was sufficient to express the purpose, and we may add, that there was not much doubt of this in any of the cases, unless it be the one last cited.

Under these authorities we hold that all the requisites concurring, the husband may be tenant by the curtesy of his wife's separate real estate, notwithstanding he is cut off from any participation in the rents and profits during coverture. But if the purpose to cut him off from the curtesy be clearly expressed in the instrument of settle

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ment, then this right is gone, although formerly this could not be done at law. See 4 Kent. 31, 32 ; 1 Washb. on Real Prop. 151, 152.

The only remaining question then is, whether such purpose is expressed in this case. Words which merely create a separate estate in the wife during coverture, will not be sufficient for the purpose ; so words which merely deprive the husband of any right to control the estate during coverture or to make it liable for his debts, will not have this effect. For to secure the estate to the sole use of the wife has the effect to deprive the husband of such rights, and the addition of these words in express terms denying to the husband any control, or providing that his creditors shall not reach the estate, though often used as a matter of precaution, in this respect add nothing to the force of the general words securing the estate to her sole and separate use. The intent to cut off the husband's right to the curtesy must, in some form, be expressed. In respect to the language of this deed, it is sufficient to say, that it is not stronger against the husband's rights than in the cases of *Baker v. Heiskell*, 1 Cold. 642, and *Frazer v. Hightower*, 12 Heisk. 94, in both of which cases it was held that the husband's right to curtesy was not cut off. The language simply denies his rights during coverture.

The result is, the decree of the chancellor must be reversed and the bill dismissed.

STATE V. ATCHISON.

(3 Lea, 739.)

Criminal law — libel by corporation.

A corporation is indictable for libel, and the joinder of an individual in a separate count is not error. (See note, p. 665.)

INDICTMENT for libel. The opinion states the case. The indictment was quashed below.

Attorney-General Lea and A. S. Colyar, for State.

John Frizzell and T. L. Dodd, for defendants.

FREEMAN, J. This is an indictment for libel, quashed in the court below and appealed by the State. The indictment has two counts,

the first against Atchison and Buck, the second against the Banner Publishing Company. The matter alleged is the same in both counts.

It is conceded, or certainly cannot be denied, that the publication is libelous, if it is published in the sense of the law, of and concerning the individuals alleged. It is matter calculated to give those who read the charge an ill opinion of the party, and to lower their standing in the community. A libel is defined by this court to be "injurious detraction of any one by writing, or equivalent symbols." *Williams v. Karnes*, 4 Humph. 11. The matter alleged here is, beyond question, of this character. It is insisted, however, that it is not sufficiently averred that the parties mentioned were the parties alluded to in the publication, and that it should have been definitely averred that they were known and recognized as the parties designated by the language used.

The article complained of, published in the *Nashville Banner*, is set out. It charges the existence of a "scoundrelly ring," a band of conspirators, who have defrauded, cheated, swindled, plundered and robbed, with other equally choice and vigorous denunciations.

Without quoting at length from the indictment, it suffices to say that it is clearly and definitely averred that these charges were intended to be and were applied to the parties mentioned. Whether under the former more stringent rules this would be sustainable, we need not now inquire. By section 5131 of the Code, it is enacted that "an indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libeled, of the defamatory matter upon which the indictment is founded, but it is sufficient to state generally that the same was published concerning him, and the fact that it was so published shall be established on the trial."

The averments of this indictment are unquestionably in compliance with the requirements of this section, and must be held good.

It is next objected that the joinder of two different counts against two different parties is error, for which the indictment should have been quashed. In the case of the *State v. Lea*, there was one count against Polly Bailey for perjury, and a second against Lea for subornation of perjury. The court say: "We are unable to perceive why these parties were not properly joined in the same indictment, and charged in separate counts, though their offenses be distinct. They were of the same nature, admitted of the same plea and same

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judgment. 1 Cold. 177. So, in this case, the offense is precisely the same — the same plea is appropriate. It is true the corporation may not be imprisoned, but the fact that the same measure of punishment cannot be inflicted in this way cannot vitiate the indictment; the judgment is of the same character, that is, a fine and costs. That imprisonment might possibly be inflicted in one case and not in the other, cannot in the least affect the validity of the indictment. The principal of such an objection is that joinder of different offenses might embarrass the parties in their defense. The fact that one could not be imprisoned after conviction, certainly can have no influence in the conduct of the trial on the question of guilty or not guilty.

We see no ground on which the judgment can be sustained, and reverse it, remanding the case for further proceedings.

NOTE BY THE REPORTER.— In the recent case of *Cowie v. Trudeau*, in the Superior Court for Lower Canada, the plaintiff sued the defendants, directors of La Banque Jacques Cartier, in damages, alleging that they had, in their annual report, conveyed to the public a false impression of the state of the bank, thereby inducing him to invest in its stock and to incur loss. It became necessary to have the books of the bank produced in court, and to this end a subpoena *duces tecum* was issued, ordering the cashier to produce the books. The cashier failed to do so, excusing himself on the ground of want of authority over the required books. A subpoena *duces tecum* was then issued against the bank — a body corporate and politic — ordering it to have the books in court on a certain day. It failed to do so, and a rule *nisi* was taken out. Counsel for the bank contended that a corporation could not be summoned as a witness, but Mr. Justice JETTE held that the rule for contempt must be declared absolute, and he accordingly fined the bank forty dollars. This is said to be the first time in the history of Lower Canadian jurisprudence that this point has arisen, and the decision is, consequently, of considerable importance. In *People v. Albany and Vermont Railroad Co.*, 12 Abb. Pr. 171; *S. C.*, 20 How. P. R. 358, it was held, by HOSKBOOM, J., in an elaborate opinion, that a corporation is liable to punishment for contempt, disagreeing with the opinion of DUER, J., in *Davis v. Mayor*, 1 Duer, 484.

CASES
IN THE
SUPREME COURT
OF
VERMONT.

BOUTELLE v. WESTCHESTER FIRE INSURANCE CO.

(51 Vt. 4.)

Insurance — overvaluation.

A policy of fire insurance conditioned to be void for overvaluation, is avoided by any substantial overvaluation whether fraudulent or innocent.*

ACTION on a policy of fire insurance, conditioned to be void in case of “any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in a written application or otherwise.” The opinion states further facts.

The plaintiff had judgment below.

Heath & Carleton and *R. S. Taft*, for defendant.

J. O. Livingston and *J. A. Wing*, for plaintiff. The charge as to the effect of overvaluation was correct. An overvaluation of property insured, made in good faith — not fraudulent — will not avoid the policy. *Philips v. Merrimack Fire Ins. Co.*, 10 Cush. 350; — *v. Niagara Fire Ins. Co.*, 16 Wis. 523; *Laidlaw v. Liverpool &*

* Otherwise as to an innocent overvaluation in proofs of loss. *174 N. W. Nat. Ins. Co. v. Wla. Sup. Ct.*, May 27, 1890. RRR.

Boutelle v. Westchester Fire Insurance Company.

London & Globe Ins. Co., 13 Grant, 377; *Bonhan v. Iowa Central Ins. Co.*, 25 Iowa, 328; *Riach v. Niagara District Ins. Co.*, 21 U. C. C. P. 464; *Williams v. Phoenix Ins. Co.*, 61 Me. 67; *Brown v. Quincy Mutual Ins. Co.*, 105 Mass. 396; *S. C.*, 7 Am. Rep. 538. And see 3 Bennett Fire Ins. Cas. 425, 653, and 5 id. 139, 181, 352, 407.

Ross, J. (Omitting other points)

III. The defendant requested the court to instruct the jury that if the plaintiff at the time of the application for the policy in question made a substantial overvaluation of the property, the contract was null and void, and the plaintiff was not entitled to recover. The court refused so to instruct the jury, but did instruct them, in substance, that in order for such overvaluation to avoid the policy, it must have been made by the plaintiff knowingly and intentionally, to induce the contract of insurance, and that the contract was made in reliance on such overvaluation. This is the usual instruction for the avoidance of any contract procured by fraud, and is applicable to this class of contracts as well as others, where the contract itself contains no stipulation in regard to the effect of overvaluation. In the cases cited by the plaintiff in support of the instruction, so far as they have been furnished for examination, with a single exception, the policies contained no express stipulation in regard to the effect of overvaluation. Some had no stipulation whatever bearing upon its effect in the contract, and others contained a stipulation that any misrepresentation by the assured *material to the risk* should avoid the policy. In regard to this latter class, it has been correctly held, that in a policy not valued, that is, where by the terms of the policy the value of the property insured was not definitely determined, but left open to be determined by evidence *aliunde*, overvaluation by the assured was not material to the risk, and would not avoid the policy unless fraudulently made. The single exception is *Bonhan v. Iowa Central Ins. Co.*, 25 Iowa, 329, in which the policy contained a stipulation in regard to the effect of overvaluation like the one in the case at bar. The court were not agreed upon the ground of the decision, part of the court holding that on the facts found there was not an overvaluation by the assured, or that it did not appear that there was, and a part that it was not found that such overvaluation, if it existed, was fraudulent. So far as the decision is placed on the latter ground we think it is not supported by the better considered cases. The policy in the case at bar contains the following stipulation " And

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any false representation by the assured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever either in a written application or otherwise," shall avoid the policy. Hence by the contract itself the effect of an overvaluation upon the policy is determined. The court cannot make contracts for the parties. Its province is to interpret and give effect to them as made. By this stipulation a substantial overvaluation of the property, that is, an overvaluation such as would not ordinarily arise from a difference of opinion, whether honestly or fraudulently made by the assured, avoids the policy. Such has been the holding of the courts in a large number of cases. *Smith v. Bowditch Mutual Fire Ins. Co.*, 6 Cush. 448; *Vose v. Eagle Life & Health Ins. Co.*, id. 42; *Barrett v. Mutual Fire Ins. Co.* 7 id., 175; *Wilbur v. Bowditch Mutual Fire Ins. Co.*, 10 id. 446; *Gould v. York Co. Mutual Fire Ins. Co.*, 61 Me. 401; *Carpenter v. American Ins. Co.*, 1 Story, 57; *Catron v. Tennessee Ins. Co.*, 6 Humph. 176; *Amazon Ins. Co. v. Gilbert*, 27 Mich. 429. This holding is an application to this species of contracts of a well-settled principle of the law of contracts, that what the parties themselves have declared material and sufficient to render the contracts void, must be held material, and have such effect as the parties intended. There was no written application in this case. In what the claimed overvaluation consisted is not disclosed by the exceptions, and we make no ruling in regard to what would constitute an overvaluation in a policy of this kind, which insured only \$2,500 on the property, and gave permission to the assured to obtain \$7,500 additional insurance. Whether the quantity of oats was being added to day by day, or whether it was expected to be added to before the additional insurance should be obtained, is not disclosed by the policy or exceptions. As instruction was requested and given on this subject, we are to assume there was no evidence tending to show overvaluation by the plaintiff. In refusing this request and in the instruction given in answer to it, we think the court erred, and for this error the judgment of the County Court is reversed and the cause remanded.

Dale v. Robinson.

DALE v. ROBINSON.

(51 Vt. 20.)

Marriage — wife's separate property — when charged with her debts.

Debts contracted by a married woman in the management and for the benefit of her separate property, or for her benefit on its credit, will in equity be charged on such property, whether it be personalty or realty, unless the instrument creating her estate therein protects it from being so charged, although she could not exercise the *jus disponendi* without procuring the formal concurrence of her husband, or the permission of the court; although the husband had possible rights as tenant by curtesy; although she allowed the profits arising from the property for which the debts were contracted to be used in the support of the family of herself and her husband, and although the charges were made to both husband and wife.*

BILL for an accounting and to charge the separate estate of a married woman. The opinion states the facts. The bill was dismissed *pro forma* below.

Heath & Carleton, for orator.

J. A. & G. W. Wing, for defendants. The wife's estate cannot be charged with the payment of the orator's claim. See *BARRETT, J.*, in *Frary v. Booth*, 37 Vt. 87; *Hulme v. Tenant*, 1 Lead. Cas. Eq. 687, and notes; *Yale v. Dederer*, 18 N. Y. 265; *Watkins v. Halstead*, 2 Sandf. 311; *Willard v. Eastham*, 15 Gray, 328; *Armstrong v. Ross*, 5 Green Ch. 109; *Buck v. Breckenridge*, 16 B. Monr. 482; *Peake v. La Barr*, 6 Green Ch. 269; *Eldridge v. Preble*, 34 Me. 148; *Davis v. Mullett*, id. 429; *Brown v. Glens*, 42 N. H. 160; *Eaton v. George*, id. 375; *Aims v. Foster*, id. 381; *Whipple v. Giles*, 55 N. H. 139; *Elder v. Jones*, 85 Ill. 345.

Ross, J. The orator in the bill states that since January, 1867, the defendant, Mary A. Robinson, then and still the wife of the defendant, Isaac D. Robinson, was and still is the owner and possessor of certain personal and real property in Moretown, as her sole and separate property, which was managed and operated by her husband

* See 20 Alb. L. J. 244, 264.

as her agent and for her benefit; that the real estate consisted of lands, houses, saw and grist mills, in the latter of which she manufactured lumber and ground grain for herself and others; that the orator during said time has worked for her on said mills, and sold her lumber and other property, which went for the benefit of her separate property, on her sole credit and the credit of said property; that during all said period, L. D. Robinson was destitute of property and wholly irresponsible, and claiming that her separate property should be charged with the payment of such indebtedness from her to the orator. The defendants have answered separately. They admit that she is the owner of the property specified in the bill. She admits that during the time stated in the bill L. D. Robinson has managed the property as her husband, has run the mills, bought logs and sold lumber, and she supposes the business has been done in her name. She denies that she has ever contracted with the orator personally, directly or indirectly, or that she has ever authorized her husband to pledge her credit so as to bind her real estate. He makes a similar denial. He admits that he has run the mills in her name for the support of the family. She avers he was to hire help, buy logs and sell lumber, and pay the help out of the avails of the lumber sold. Both admit that the orator has worked on the mills and furnished logs or lumber, etc., but deny any existing indebtedness to him for the same. There is no denial of the insolvency of the husband.

The orator's charges stand on his book to M. A. and L. D. Robinson. Whether the book is original, or substituted since the charges accrued, we do not consider material to the solution of the questions involved in the case, except so far as his credibility as a witness is thereby affected. The deed conveying the property to Mary A. Robinson is in common form. It contains no limitation that it shall be held to her sole and separate use. It was made to her while covert. It does not appear whether the purchase-money was property set apart to her sole and separate use, further than it was money which the husband allowed her to have, control and invest in the real estate as she did invest it. The defendants have been and still are living together on the property as husband and wife. They have had children born, so that on her death he would be entitled to the use of her real estate as tenant by the curtesy. From the evidence in the case, notwithstanding the denial in the answers, and the rule that a responsive answer must be overcome by more than the testimony of one witness, we are satisfied that the orator performed the

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labor charged at the request of the defendant wife, and that he performed the labor and sold and delivered the other property charged on the credit of the wife and of her property under such circumstances that she knew, or in the exercise of ordinary care and prudence ought to have known, that the labor was so performed, and the lumber and other property so sold and delivered.

The question presented is, whether these facts entitle the orator to the relief prayed for. In equity the wife is treated as a *feme sole sub modo*, at least in regard to her separate property. In England the Court of Chancery has treated a married woman in regard to her separate property more nearly as a *feme sole* than have the Courts of Chancery in the United States. There the courts have treated her general engagements, without regard to whether they have been beneficial to her or her separate estate, or contracted in its management, as a general charge upon the personal property of her separate estate and the rents and profits of her real estate. As stated by Lord THURLOW in *Hulme v. Tenant*, in 1 Lead. Cas. Eq. 394, "determined cases seem to go thus far, that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate and rents and profits when they arise to the satisfaction of such general engagement; but this court has not used any direct process against the separate estate of the wife, and the manner of coming at the separate property of the wife has been by decree to bind the trustees as to the personal estate in their hands, or rents and profits according to the exigencies of justice or engagement of the wife, to be carried into execution." Where there was no trustee of her separate estate appointed in the instrument creating the estate, the court has treated the husband as trustee for the purpose of enforcing her general engagements against such estate. Her separate real estate was not allowed to be taken on her general engagements, as by the laws of England real estate, with some few exceptions, could not be taken in satisfaction of debts. Since by reason of the disability of coverture she could not bind herself by promise or contract and was only treated as a *feme sole ex necessitate*, in regard to property held to her sole and separate use, the court rendered no decree binding or operative against her personally. In most cases the instruments creating the separate estate empowered her to dispose of the same by appointment in writing. The *jus disponendi* has attached where there is no limitation to the contrary

imposed by the instrument creating the estate. The undisposed-of real estate settled to her separate use of which she is seized in fee, descends to her heir subject to the right of the husband as tenant by the curtesy. See notes to *Hulme v. Tenant*, *supra*. The Courts of Chancery in this country generally have not followed the leading of that court in England so far as to make the wife's general engagements a charge upon her separate property.

The subject has engaged the attention of, and been very ably discussed by, many of the State courts. The results arrived at are far from harmonious. In South Carolina, Ohio, Pennsylvania, and some other States, it is held that a married woman is not for any purpose to be treated as a *feme sole* in regard to her separate estate, and that she has no power to deal with or charge the same except, and only so far, as the power is given by the instrument creating the estate; and where such power is given, it must be strictly followed, to operate as a charge upon such estate. She is not regarded as having any power over such estate by virtue of its being held to her sole and separate use, and all her dealings in regard to such estate are considered in the light of the execution of a power conferred by the instrument creating the estate. In other States the court has so far treated a married woman as a *feme sole* in regard to her separate estate that whenever a clear intention on her part to charge such estate is shown, without regard to whether the debt was contracted for her benefit or that of the estate, or as a mere surety or accommodation indorser, payment has been enforced therefrom. But the doctrine more generally adopted in this country is that announced by the court in *Yale v. Dederer*, 18 N. Y. 265, which is a leading case on the subject, and in which, on full discussion, it is held that equity recognizes a married woman's debt, and charges it upon her separate estate, not on the ground that the contracting of it is of itself an appointment or charge, but because when contracted on the credit of the separate estate, or for its benefit, or that of the woman, it is just that the estate should answer; and that when the married woman is a mere surety, equity will not enforce against her a promise which is void at law, and in such case her separate estate can only be charged by virtue of some instrument for that express purpose. Among other leading cases in this country on this subject are the following: *Willard v. Eastham*, 15 Gray, 328, in which the authorities are reviewed, and Hoar, J., says: "Her general personal engagement will not of itself affect her

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separate property, and therefore where creditors do not claim under any charge or appointment made in pursuance of the instrument of settlement, they must show that the debt was contracted either for the benefit of her separate estate or for her own benefit upon the credit of the separate estate, and our conclusion is that when by the contract the debt is made expressly a charge upon the separate estate, or is expressly contracted upon its credit, or when the consideration goes to the benefit of such estate, or to enhance its value, then equity will decree that it shall be paid from such estate or its increase to the extent to which the power of disposal by the married woman may go. But where she is a mere surety, or makes the contract for the accommodation of another without consideration received by her, the contract being void at law, equity will not enforce it against her estate, unless an express instrument make the debt a charge upon it." *Burch v. Breckinridge*, 16 B. Monr. 482, in which STIMPSON, J., giving the opinion of the court, after stating that a married woman cannot at common law contract as *feme sole*, nor as such sue or be sued, says: "That being the legal rule, courts of equity acting in conformity with it have held that the wife cannot bind herself personally, nor bind her separate estate by her general engagements. Courts of equity, however, as a consequence of the doctrine established by them that a married woman may have and enjoy separate estate, enable her to deal with it, alien and incumber it when she shows an intention so to dispose of it. So far as the separate estate consists of land, it cannot be made liable by a verbal contract." *Armstrong v. Ross*, 20 N. J. Eq. 109, a leading case in that State, in which the chancellor uses the following language: "If a married woman having a separate estate contracts debts for the benefit of her separate estate, or for her own benefit on the credit of her separate estate, although she will not be held liable, or any decree made against her personally, these debts will be declared a charge upon her separate estate, and payment enforced out of it." It was also held in that case that such debts are not a lien upon such estate until made so by decree of court. In *Peake v. La Bar*, 21 N. J. Eq. 269, the bill sought to charge the wife's separate real estate held under the married women's act of 1852, with the payment of a note made by her husband and indorsed by her for his accommodation. It was held that for the payment of such a debt she could charge her separate real estate only by a mortgage executed according to the laws of the State. The chancellor says: "The courts of this country

have declared the estates of married women held under these acts to be liable for debts contracted by them for the benefit of these estates, or for their own benefit on the credit of these estates. But they go no further than this." Citations from other and more recent decisions might be multiplied *ad libitum*, but these will suffice to show the general drift and ground of the decisions in this country. In this State the cases of *Frary v. Booth*, 37 Vt. 78, and of *Partridge v. Stocker*, 36 id. 108, touch upon the rights of creditors against the separate estate of married women in view of the facts presented by those cases, but not with reference to the precise question presented by the case at bar. The real estate in *Frary v. Booth* was devised to the defendant, who was a married woman abandoned by and living apart from her husband. The debt was contracted by her for the support of her family and attempted to be secured by a mortgage of the farm executed by her alone. The mortgage was upheld as a valid charge upon the property, though defectively executed. The wife in *Partridge v. Stocker* had been allowed by her husband to carry on the millinery business as a *feme sole* in her own name and on her personal credit. The debt was contracted by her in making purchases for the business, and was enforced against her stock of goods, notwithstanding her husband had sold and assigned them to the defendant. In a recent case heard at the last term of the Supreme Court for Windsor county, the question how far and when the Court of Chancery will enforce the general engagements of a married woman against her separate property, was discussed, but no decision has yet been announced. In that case the court was asked to enforce a debt where she was a mere surety, against such estate.

We are therefore untrammelled by any former decision of the court in the decision to be made in this case. From the best consideration we have been able to give to the question, and from the exhaustive review of all the leading cases on this subject, both in England and in this country, in the notes to *Hulme v. Tenant*, *supra*, contained in the Leading Cases in Equity, we think it is the better established doctrine that a married woman is only *sub modo* a *feme sole* in dealing with her separate estate; that her debts contracted in its management and for its benefit, or for her benefit on the credit of such estate, in equity, will be enforced against such estate, whether the same consist of personal or real estate, unless the instrument creating such estate protects it against being charged with such debts; but that her general engagements not thus connected

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with and growing out of her separate estate, being void at law, will not in equity be enforced against such estate, unless they are legally made a charge thereon, by a duly executed mortgage, if the separate estate to be charged be real estate, and by a pledge and delivery of the property pledged if the separate estate consist of personal property. The claims sought to be enforced by the orator fall within the class first named. The orator's work in erecting one of the mills on her estate went to enhance its value permanently; the lumber was bought in her name to be manufactured in her mills, and the profits, if any, legally accrued to her; the pasturing was for her cows. That she allowed the profits arising from the manufacture of the lumber and the income from the cows to be used in the support of the family can make no difference. She had the right to give them to her husband if he were of sufficient pecuniary ability to support the family, which he was legally bound to do. If by reason of his pecuniary inability she was compelled to allow them to be so used, they were used for her benefit in that they went for her own support. It is manifest that the entire debt was contracted on the credit of her property. That the charges were made jointly to her and her husband does not defeat the orator's right to have them charged upon her property. The indebtedness charged on the wife's separate property in *Hulme v. Tenant*, was against both husband and wife, but created on the credit of the wife's separate estate.

But it is contended by the defendants that the right of disposal of the property sought to be charged is not vested in the defendant wife. If not in her, it is difficult to determine its resting place. The conveyance is in fee absolute to her. By the conveyance she is not limited in the *jus disponendi*. Her husband has no power to dispose of or in any way incumber it. His creditors cannot seize the rents, issues and products of her real property in satisfaction of their debts, nor any money due arising from its sale. Gen. Sts. chap. 71, sec. 18. She may devise it by will. Section 17. If he abandons her she may be allowed to sell and convey the same in her own name on application to this court. Section 1. If he ill use her, on petition to the chancellor, she may be allowed to live separate and apart from him, and enjoy her real estate for her sole use and benefit. However much he may improve her estate by his labor and management, his creditors can levy upon no part of the improved estate, nor of its rents and products. *White v. Hildreth*, 32 Vt. 265; *Webster v. Hildreth*, 33 id. 457. It is true that by reason of the disability of

coverture, he must join in the deed conveying the same. On the disability ceasing, her power of disposal is complete. The title being in her, that conveyed during coverture must issue from her. He is made a party to the conveyance the same as he is to a suit for the conversion of or injury to her separate property by reason of the legal fiction which merges her existence in his.

In courts of equity, however, for many purposes, and especially for the protection, management and enjoyment of her separate estate, the wife is recognized as having a separate legal existence. Its powers may be invoked in her behalf against the husband's encroachments on her rights. Hence in the forum of equity the statute requiring him to join in the conveyance of her real estate can hardly be held to be a limitation upon her *jus disponendi* of the same. The only right or interest in the wife's real estate which the statute has left in the husband, is that of residing on it with her, if she sees fit to live upon it, and of occupying the same after her decease as tenant by the curtesy; and it is doubtful if the latter attaches to such of her real estate as she disposes of by will. But if it does attach, we think it should be no bar to the enforcement of a debt against such estate on which he is jointly liable with her. It but allows the taking of his possible interest in expectancy, in satisfaction of a debt on which he is jointly liable. The statute has so far stripped the husband of any beneficial interest or right in or to the real estate of his wife, that such estates more nearly resemble estates held to her sole and separate use than any other known and well-defined estates. As we have before said, in England, the husband takes as tenant by the curtesy so much of the wife's strictly sole and separate real estate as remains undisposed of at her decease. He would also in this State. Hence the fact that this right might attach to the defendant wife's lands in favor of the defendant husband in this case, cannot defeat the right of the orator to have his debt charged upon and enforced against the estate in question, if the debt be of such a character that it could be enforced in the same manner against her strictly sole and separate estate. By the provisions of the statutes of this State real estate held to the wife's sole and separate use can only be conveyed by the joint deed of the husband and wife, and is also subject to his right as tenant by the curtesy. The same is true in most of the other States in which it has been held that such estates may be charged with the payment of her debts contracted for the benefit of such estate, or for her benefit on the

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credit of the estate. The objection against making the orator's debt a charge upon and enforcing its payment out of the wife's real estate arises wholly from the technical disability of her coverture. No one has any present interest in her real estate to be protected by the interposition of this disability, except herself and her husband. Being allowed by the statute and in equity to hold the title to and have the use of real estate, as an incident thereto, and *ex necessitate*, in equity, she is allowed to contract for its management and improvement on the credit of the estate, otherwise, if the husband be without credit, or if, as he may, he refuse to use his credit for that purpose, the estate might run to waste, and she be deprived of all beneficial enjoyment thereof. Hence it would be inequitable to allow her to take advantage of this technical disability to defeat the orator from recovering payment for his labor bestowed upon, and for property sold for the benefit of, her real estate, at her request and on the credit of such estate. And the husband, if he has under the statute any such interest in her real estate as might in certain events allow him to take advantage of this disability, which is at least questionable, by consenting to and acting as her agent in the entire transaction out of which the orator's debts arose, has waived the same, and it would be inequitable to allow him now to set up and take advantage of the disability of his wife's coverture, especially when by such allowance the wife would reap almost the entire advantage to be derived therefrom.

The result is, the decree of the Court of Chancery, *pro forma*, dismissing the bill is reversed, and the cause remanded, with a mandate to that court to refer the cause to a master to ascertain the amount due the orator on the claims set forth in the bill and testimony, and to enter a decree for the orator for the payment of such sum from the separate property of the defendant wife, to be enforced by any proper process.

WHITCOMB v. JOSLYN.

(51 Vt. 79.)

Infancy — contract — fraud.

Plaintiff falsely representing himself to be of full age, bought a wagon paying part, and giving his note secured by a lien on the wagon for the remainder. After using the wagon until the use was worth more than what he had paid, and until it had depreciated by more than a like sum, he made default in payment, whereupon defendant took the wagon under his lien, and sold it at auction. Plaintiff brought *assumpsit* for the money he had paid. *Held*, that he was entitled to recover.

ASSUMPSIT. On April 21, 1877, the plaintiff, falsely representing himself to be of age, bought a wagon of the defendant for fifty dollars, paying nine dollars, and for the remainder giving his note secured by a memorandum of lien which was duly recorded. He afterwards paid only ten dollars on his note, and the defendant took possession of the wagon and sold it at public auction. The wagon was then worth not more than twenty dollars, and was sold far less than that sum. The plaintiff used the wagon until November 13, 1877, and the use was worth what he had paid. The plaintiff was under age all the time that he had the wagon, but never offered to return it and rescind the contract. The action was to recover the money paid.

Judgment for the plaintiff below.

Viles & Thorp, for defendant. The plaintiff cannot take advantage of his infancy, because he did not offer to rescind the contract and return the wagon. *Farr v. Sumner*, 12 Vt. 32; *Price v. Furman*, 27 id. 268; *Wiser v. Lockwood's Estate*, 42 id. 720. The use of the wagon should offset the money paid.

C. C. Burke, for plaintiff.

DUNTON, J. I. It is not controverted that all contracts entered into by an infant, except for necessities, can be disaffirmed by him, and if executed, the money paid, or other property delivered thereon by him, recovered back, if he restore to the other party what he received therefor. In the case at bar, the defendant took possession of the wagon by virtue of a lien reserved thereon by him, so that

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by his own act, the property sold by him to the plaintiff went back into his, the defendant's possession. This left nothing for the plaintiff to do to entitle him to the money paid by him towards the wagon but to disaffirm the contract. This he did; and his right of recovery is not affected by the fact that the wagon depreciated in value while in his possession by reason of use or otherwise. The plaintiff is no more liable for the use of the wagon than for its agreed price; neither the wagon, nor the use of the same, by any thing appearing in the case, can be claimed to be necessities, for which he would be liable. *Price v. Furman*, 27 Vt. 268.

II. Does the fact that the plaintiff, at the time he traded for the wagon, falsely represented to the defendant that he was of age, affect his right of recovery in this case? We think not. To hold that he is estopped by such representations from avoiding the contract by asserting his infancy, would be an exception to the law governing this class of cases. Such representations cannot be of any greater force to bind the plaintiff than the contract itself; but whether the plaintiff would be liable to the defendant for the deceit, in an action *ex delicto*, is a question we have no occasion to consider or decide. In our opinion the false representations complained of do not make the contract any more binding than it otherwise would be. *Burley v. Russell*, 10 N. H. 184; *Fitts v. Hall*, 9 id. 441; Schoul. Dom. Rel. 567.

Judgment affirmed.

STATE V. SHELTERS.

(51 Vt. 103.)

Criminal law — forgery — “acquittance.”

A receipt for money as part of the purchase-price of a farm is an “acquittance” within the statute of forgery, and an indictment for forgery thereof is good without charging any extrinsic dealings between the parties.

INDICTMENT for forgery. The instrument forged was originally as follows:

“\$54.84.

NEWPORT, Sept. 13, 1871.

“Received of Philip Shelters fifty-four 84—100 dollars on account, to apply on payment on the farm I now live on.

“DUDLEY HOLBROOK.”

And afterwards the respondent altered it to read as follows:

“\$554.84.

NEWPORT, Sept. 23, 1871.

“Received of Philip Shelters five hundred fifty-four 84-100 dollars on account, to apply on payment of the farm I now live on. It is part of the purchase-money which I am to deed to him when 2000 is paid which is the purchase-money.

“DUDLEY HOLBROOK.”

The respondent demurred to the indictment for that the instrument was not an acquittance; and for that there was no allegation of any dealings between Holbrook and the respondent, whereby it appeared that the instrument could have been used to defraud Holbrook. The demurrer was, *pro forma*, overruled.

H. C. Wilson, L. H. Thompson and H. S. Royce, for appellant. The writing in question was not an acquittance within the meaning of section 1, chapter 114, General Statutes. 1 Bouv. Law Dict., tit. “Acquittance;” 1 Swift Dig. 299; 1 Shep. Touch. 347; *Commonwealth v. Lawless*, 101 Mass. 32; *Commonwealth v. Ladd*, 18 Mass. 526; 2 Pars. Cont. 555. And see Slade’s Sts., chap. 31, sec. 19. The indictment was defective in not alleging that the writing was delivered to the respondent as an acquittance, or that the respondent held it as such; and in not alleging dealings between the respondent and Holbrook from which it might appear that the receipt could have been used to defraud Holbrook. 2 Am. Crim. Law, 1499.

W. R. Rowell, State’s Attorney, and *Crane & Alfred*, for the State.

DUNTON, J. I. The instrument set forth in the indictment is in form a receipt for money paid to apply towards the purchase-money of a farm; and the first question arising upon the demurrer is, whether it is also an acquittance or a discharge, within the meaning of section 1, chapter 114 of the General Statutes, on which the indictment is founded. The statute in question prescribes the punishment for forging, among other written instruments, “any acquittance or discharge for money or other property.” Unless this receipt is an acquittance or a discharge for money, the forgery of it is not punishable under section 1, chapter 114 of the General Statutes, nor has it been punishable, by statute, since the adoption of the Revised Statutes of

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1839. From Slade's Compilation of the Statutes in 1824, to the adoption of the Revised Statutes in 1839, the forgery of "any acquittance or receipt for money, goods, or other property" was punishable by statute. But in the Revised Statutes the word "discharge" was substituted for "receipt," and the word "goods" omitted; and the law has remained the same ever since. We think it is apparent from the old statute and the amendment, that the legislature understood a receipt to be included either in the term acquittance or discharge; for it is hardly supposable that the Legislature intended, by the amendment of 1839, to exclude the forgery of a receipt for money or other property from the operation of the statute, so that it would not thereby be punishable. The word acquittance, although perhaps not strictly speaking synonymous with receipt, includes it. A receipt is one form of an acquittance; a discharge, another. It is not questioned but that a receipt in full is an acquittance. Why, therefore, is not a receipt for a part of a demand or obligation an acquittance *pro tanto*? We are aware that lexicographers do not fully agree as to this; but in legal proceedings, a receipt is regarded as an acquittance. See 2 Bish. Crim. Law, § 557; *Rex v. Martin*, 7 C. & P. 549; *Regina v. Houseman*, 8 id. 180; *Regina v. Atkinson*, 1 Car. & M. 325; *Com. v. Ladd*, 15 Mass. 526; Whart. Proc. Ind. 383.

II. It is also claimed that the indictment is defective for the reason that it contains no averment of any transactions or dealings between the respondent and Holbrook from which it appears that the receipt could have been used to defraud; nor any averment that the original receipt was ever delivered to the respondent as an acquittance or discharge, or held by him as such. But such averments are unnecessary. Extrinsic facts are required to be set forth or stated, only when the operation of the instrument upon the rights or property of another is not apparent from the instrument itself. Such is not the case with the instrument in question. Its effect upon the rights of Holbrook is apparent from the instrument itself. The intent to defraud is the gist of the offense charged; and this must not only be alleged in the indictment, but proved. See *Snell v. State*, 2 Humph. 347; *Rex v. Martin*, *supra*; 2 Bish. Crim. Proc. § 366; 2 Bish. Crim. Law, §§ 354, 355; 2 Whart. Crim. Law, § 1487; *Com. v. Ladd*, *supra*; *People v. Stearns*, 21 Wend. 409.

The intent to defraud is sufficiently alleged, under our statute, although the person or party intended to be defrauded is not named. See § 8, chap. 114, Gen. Sta.

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The judgment of the County Court, overruling the demurrer and adjudging the indictment sufficient, is affirmed, and the case remanded to be proceeded with.

GIDDINGS v. GIDDINGS' ADMINISTRATOR.

(51 Vt. 227.)

Negotiable instrument — delivery — secor — consideration.

G., wishing to pay to each of his three nephews a third part of their father's interest in his mother's dower estate, which G. had had and enjoyed, but recovery of which had become barred by the statute of limitations and also, wishing to make to each a gift, having declared to them his purpose so to do, drew three promissory notes, payable one to each, in one year after his death, intending to leave them in the hands of some third person, subject to his own control, to be delivered after his death, if he should not retake them or otherwise direct. He put the notes into an envelope, sealed and addressed to one of the nephews and others, in care of F., and delivered it to F., with directions about its custody, which F. indorsed on a wrapper that he put around the envelope as follows: "Letter left in my care by Benj. Giddings, to be handed to Mr. Giddings, if he calls for it; otherwise not to be opened in his lifetime." The intestate died without ever having called for the package. After his death, F. delivered the notes to the respective payees. *Held*, a valid delivery of the notes,* and that they were upon a valuable consideration, and enforceable for the full amount; although the original claim was less than the note.

CLAIM on a promissory note. The opinion states the facts. The plaintiff had judgment for one-third his claim. Both parties appealed.

Levi H. Brown, J. B. Beaman and Prout & Walker, for plaintiff.

W. G. Veazey and J. B. Phelps, for defendant. There is no consideration beyond the smaller sum, and the notes cannot be sustained as a *donatio causa mortis*. *Holley v. Adams*, 16 Vt. 206. *Smith v. Kittridge*, 21 id. 238; *Parish v. Stone*, 14 Pick. 193, *French v. Raymond*, 39 Vt. 623. There was no delivery. *Gough*

* To same effect, *Ellis v. Secor* (31 Mich. 185), 18 Am. Rep. 178, and note, 184; *Gardner v. Morris* (32 Md. 78), 3 Am. Rep. 115.

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v. *Findon*, 7 Exch. 48; *Bromage v. Lloyd*, 1 id. 31; *Clark v. Sigourney*, 17 Conn. 510; *King v. Woodbridge*, 34 Vt. 565. There is a distinction between the delivery of a deed to a third person as an escrow, and of a note—a mere promise to pay. In the case of the first delivery of a deed the title passes from the time of the first delivery. But the courts of different States are in controversy as to the effect of the delivery of an escrow, to be delivered after the death of the grantor; the courts of New Hampshire holding one way, as in *Cook v. Brown*, 34 N. H. 460, while the courts of Vermont hold the other, as in *Morse v. Slason*, 13 Vt. 296. The authority of Frisbie, as the agent of Giddings, to deliver the notes, ceased upon the death of Giddings. 2 Kent Com. 645; 1 Pars. Cont. 71, and cases cited; Dunlap's Paley Agency, 186 and notes.

ROYCE, J. This case was heard on the report of a referee, and the court below rendered judgment for the plaintiff, on the report, for the smallest sum named, to which both parties excepted. The facts appear fully from the report, which is made a part of the exceptions.

The first question in the consideration of the case, and the most important in the view we take of it, is as to the delivery of the note in suit. Benjamin Giddings, defendant's intestate, and his brother Joseph, met in 1867, and in conversation Benjamin admitted that he considered he ought to make good to Joseph, or to those who would have his estate, his (Joseph's) share in their mother's dower estate, which had never been claimed by Joseph, and on which the statute of limitations had then run, and which the referee finds was worth, on the 1st of January, 1866, "as near as can now be ascertained," \$375.20. In consideration of this, and certain good but not valuable considerations, Benjamin afterwards executed three promissory notes in writing for the sum of \$500 each, payable one to each of Joseph's three sons, respectively, one year after the maker's death, one of which notes is declared upon as the cause of action in this suit. He intended, as the referee finds, to leave these notes in the hands of some third person, subject to his own control, to be delivered after his death, if he should not retake them or direct otherwise. He informed Joseph and each of the payees of his intention, as above, and they all assented to the arrangement. After that he put the notes into a letter envelope and sealed it up, and wrote on it this address: "Henry F. Giddings, of Ellisburg, Jefferson county, N. Y., and others, in

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care of Barnes Frisbie, Esq., of Poultney," and delivered it to Barnes Frisbie of Poultney, at Poultney, with directions about the custody of it, which Frisbie, as the referee finds, indorsed correctly, in substance, on a wrapper that he put around it, in these words: "Letter left in my care by Benj. Giddings, to be handed to Mr. Giddings if he calls for it; otherwise not to be opened in his lifetime." Benjamin did not retake the package; and after his death in 1873, Frisbie opened it, and delivered the notes respectively to the payees named in them, this plaintiff, and Henry F. and Benjamin F. Giddings, his brothers.

In *Belden v. Carter*, 4 Day 66, A, having signed, sealed and acknowledged a deed of certain lands to B, gave the deed, in the absence of B to C, saying: "Take this deed and keep it; if I never call for it, deliver it to B after my death; if I call for it, deliver it up to me." A died without retaking the deed, and C delivered it to B. Held that the delivery become complete and took relation back to the first delivery. In *Worth v. Case*, 42 N.Y., 362, a note remained in the hands of the payee until the death of the maker, being received and held by him subject to the condition that it should be returned to the maker whenever he might wish it during his lifetime; and the note was held valid. And in *Foster v. Mansfield*, 3 Met. 412, it is laid down that if a grantor directs and intends that his deed from and after its execution shall be retained by the scrivener until after the grantor's death and then delivered to the grantee, all of which if afterwards done, the estate vests in the grantee from the time of the execution of the deed. On the authority of these cases, and the principles of law upon which they were decided, it seems clear that had Benjamin handed the notes to Frisbie with specific instructions, as in *Belden v. Carter*, *supra*, the delivery would have been sufficient, and on the death of the maker, with the option of recall unexercised, and the actual receipt of the notes by the payees, would have become complete and taken effect back by relation to the time of the deposit of the notes with Frisbie. Were the acts and words of Benjamin and the understanding and treatment thereof by all the parties, as shown by the referee's findings, equivalent to such a specific direction? Upon the part of the defendant it is contended that the acts of the maker simply constituted Frisbie a depository of the notes for him, with no authority to deliver them to the payees in any event; and that whatever agency he might have been invested with to deliver them upon further instructions was revoked by the

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death of Benjamin. In order to accept this construction, it is necessary to reject as meaningless the direction written by Benjamin upon the envelope containing the notes, and to declare unjustifiable the acts of Frisbie based upon his understanding of the meaning of that direction. The policy of the law is to give effect to all the acts and words of parties, when it can be done without repugnancy.

It is an affair of daily occurrence that notes, deeds, contracts and other written instruments, as well as personal property of every description, are placed in the hands of common carriers, and often of private carriers, by makers and consignors, with no instructions concerning their delivery, beyond a direction upon the outside wrapper in terms precisely analogous to those used in the address written upon the envelope handed to Frisbie by Benjamin Giddings. Such delivery has universally been held to be a delivery to the consignee named in such address; *Bull v. Sibbs*, 8 T. R. 327; *Biggs v. Lawrence*, 3 id. 454, though the particular carrier be not named by the consignee. *Dutton v. Solomonson*, 3 B. & P. 582; *Jacobs v. Nelson*, 3 Taunt. 423. And although the completion of the delivery is defeasible by the consignor by the exercise of his right of stoppage *in transitu*, yet upon delivery to the carrier, the property instantly vests in the consignee, and when the actual delivery to him is fully completed it takes relation back. This doctrine is based upon the theory that the consignee, either expressly or by implication, constitutes the carrier his agent to receive the property for him. In the case at bar the payees of the three notes in terms assented to their delivery to some third person by the maker, who should hold them subject to an option of recall by the maker during his life, and then complete the delivery by handing them over to the payees; also that the selection of such third person should be left to the maker. In pursuance of this arrangement Benjamin selected Frisbie as such third person, and handed the notes over to him with oral directions concerning the option of recall, and written directions, in the form of an address upon the envelope, in precisely the terms ordinarily used in delivering papers or goods through the agency of a carrier, for their delivery to the payees, in case he should die with the option of recall unexercised. From this direction Frisbie, as evinced by his acts, understood, as any intelligent person would have done, that if Giddings died without reclaiming the packet, he was to deliver it—not to Giddings' personal representatives, in the absence of any instructions written or oral to that effect—but to the parties to

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whom it was so addressed, viz.: "Henry F. Giddings and others." Benjamin did die without calling for the packet, and thereupon Frisbie, for the purpose of ascertaining who were meant by the word "others," assumed to open it, and delivered the notes to the several payees named therein. Had Frisbie been on the eve of a journey to Ellisburg, and had Benjamin handed him this packet without a word, the legal construction of the act would have been: "Deliver this package to the parties to whom it is addressed unless I exercise the right I possess by implication to direct you otherwise before the commission is executed." In this case the right to countermand the direction upon the envelope was extended by oral reservation to cover the whole period of Benjamin's life; but the principle remains the same, and the delivery, having been completed, will not be disturbed. There was a perfect consonance in the proved intentions of the parties and the manner in which they were carried out. The precise intention of Benjamin with regard to the notes as found to have been expressed by him to his brother and three nephews was gathered by Frisbie from the oral and written directions of Benjamin to him, and from no other source, and carried out by him to the letter. We find in this whole transaction all the elements which in law are held to constitute a valid delivery through an agent — that Frisbie received the note in suit as agent for the payee, subject to an option of recall by the maker, in like manner as a carrier receives goods as the agent of the consignee, subject to the option of the consignor to stop them *in transitu*, held it as trustee for the payee, and having completed the delivery in accordance with the direction upon the envelope and the intention of all the parties, it took effect back by relation to the original deposit with him, and constituted a full and complete delivery on that date.

The defendant seeks to avoid the note upon the further ground of want or inadequacy of consideration. The case shows that Joseph originally had a legally enforceable claim for his distributive share in his mother's dower estate; that said claim was never presented nor enforced by him, and that the interest was possessed and enjoyed with his tacit consent and permission, by Benjamin. "The defendants having received a benefit by the permission of the plaintiff, is a good consideration." *Davis v. Morgan*, 6 D. & R. 42; 4 B. & C. 8. So also is an outlawed legal claim. *Hawley v. Farrar*, 1 Vt. 420; *Eastwood v. Kenyon*, 11 Ad. & E. 438; *Lee v. Muggridge*, 5 Taunt. 37; *Smith v. Jameson*, 5 T. R. 603; Esp. N. P. 116; Bull. N. P. 147;

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Barlow v. Smith, 4 Vt. 139, 144; *Glass v. Beach*, 5 id. 172; *Boothe v. Fitzpatrick*, 36 id. 681. That the consideration for the note was a certain specific outlawed claim, and less in amount than the face of the note, is immaterial in the absence of fraud or mistake upon the part of either of the contracting parties. In *Oakley v. Boorman*, it is said: A promise or obligation cannot be defeated in whole or in part, on the ground of the inadequacy of the compensation received for the obligation incurred — the slightest consideration is sufficient to support the most onerous obligation; the meaning of the rule that you may impeach the consideration is only that you may show fraud, mistake or illegality in its concoction, or non-performance of the stipulations of the agreement on the part of the promisee. 21 Wend. 588. Contracts entered into by parties knowing their rights, though upon inadequate consideration, will not be set aside in law. *Harrington v. Wells*, 12 Vt. 505; *Paige v. Ripley*, 12 id. 289. Nor in equity. *Stephens v. Buteman*, 1 Bro. C. C. 22; *Griffith v. Spratley*, 1 Cox, 383; *Collin v. Brown*, 1 id. 428. Family agreements are especially favored in this respect. *Stockley v. Stockley*, 1 Ves. & B. 23; being based upon good as well as valuable considerations. *Persse v. Persse*, 7 Cl. & F. 279; 1 West, 110.

The defendant claims that if any recovery can be had in this action it should be only for the amount found by the referee to be the actual value, at the time the note was given, of one-third of Joseph's share of the dower interest. It seems to be well settled that to entitle a defendant to an abatement from the sum for which the note was given, in a case of this kind, two things at least must concur, viz., fraud upon the defendant in procuring the note for the sum named, or at least, a failure of the consideration from the understanding of the parties at the time, and an ability by computation to fix the amount to be deducted. *Walker v. Smith*, 2 Vt. 539; *Stone v. Peake*, 16 id. 213; *Harrington v. Wells*, 12 id. 505; *Harrington v. Lee*, 33 id. 249. Both these elements are lacking in the case at bar. No fraud is alleged and no misunderstanding about or failure in the consideration. And it is not found with certainty what the actual value of Joseph's share in the dower estate was at the time the notes were given; nor is it found affirmatively that in the settlement the fifty years' use and the purchase-money of Joseph's distributive share of the farm, for which Joseph once had a legal claim against the estate of his father, and which inured, at least partially, to the benefit of Benjamin, were not taken into consideration

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as forming a part of the consideration of the notes. Upon such facts as these, it would be extremely hazardous, to say the least, to undertake to reduce written contracts or promises to a *quantum valebat*.

Judgment reversed, and judgment for plaintiff on the report for the larger sum named, with interest and costs ; to be certified to the Probate Court.

 JACKSON V. JACKSON.

(51 Vt. 262.)

Surety — recovery by, of usurious interest paid for principal.

One who becomes a surety on a note, at the request of the principal, and with him agrees to pay usurious interest thereon, and who pays the note after maturity, with such interest, may recover of the principal the money he so pays.

ASSUMPSIT. The facts are stated in the opinion. The plaintiff had judgment below.

———, for defendant. The plaintiff can recover only what he was bound to pay. *Hargrave v. Lewis*, 3 Ga. 103; *Thornton v. Prentiss*, 1 Mich. 193.

E. R. Hard, for plaintiff.

Ross, J. It is found by the referee that in 1856 the plaintiff signed for the defendant, as surety, a \$1,000 note, payable in one year from its date, with the interest annually, and that at the time the money was obtained and the note given, it was "agreed between all the makers and the payee, that ten per cent annual interest should be paid on the note." The defendant had all the money on the note and took it with him to California. When the note became due, the defendant did not pay it, as it was his duty to do, and the note was allowed to run until 1862, when the plaintiff and the other surety took it up, and paid to the payee, with what they had paid before that time as interest thereon, ten per cent interest on the note. The only question is, whether the plaintiff is entitled to recover the extra

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interest which he paid on the note. At the request and for the benefit of the defendant, the plaintiff signed the note, and stipulated that ten per cent should be paid on the *note*, not that ten per cent should be paid on it for the year before it became due, but on the *note*, that is, so long as the note remained unpaid. This is the contract which the plaintiff entered into at the request and for the benefit of the defendant. The defendant never relieved him from it, nor notified him that he did not wish him to abide by it. When, therefore, the plaintiff paid the holder of the note his half, with ten per cent interest thereon, he paid it in fulfillment of the contract which the defendant had requested him to enter into as his surety, and so paid it at the defendant's request. It being paid at the defendant's request, the fact that the excess above six per cent was usurious, and for that reason its collection could not have been legally enforced, can make no difference. The defendant had the right to pay it, and to request the plaintiff to pay it for him. When paid by the defendant personally, or by the plaintiff as his agent at his request, he alone had the right to recover it back. It was equally at the defendant's option to have it paid, and to waive its recovery back when paid. Having exercised his option to have it paid, and having not only requested, but honorably bound the plaintiff to pay it, the fact that it was a claim not enforceable in law is immaterial. If the defendant had requested the plaintiff to make a gift to any one of a certain sum of money, he could recall the request until the money was actually passed over but, after the money had passed, he could not revoke it, nor be heard to say that the law would not have compelled him to have executed his request to the plaintiff to make the gift. As between the plaintiff and defendant, it was a payment by the plaintiff of money to the use of the defendant at his request. The counsel for the defendant concede that the extra interest paid for the year before the note fell due is recoverable because paid at the defendant's request. But as we have seen, by the terms of the stipulation entered into by the makers of the note with the payee, ten per cent was to be paid on the *note*. And as between the plaintiff and defendant, it was the duty of the defendant to put an end to the existence of the note by paying it. The stipulation was a request to plaintiff to pay the ten per cent until the defendant, or some other one in his behalf, did end the existence of the note by its payment. *Ford v. Keith*, 1. Mass. 139. This holding does not conflict but is in accord with *Thurston v. Prentiss*, 1 Mich. 193, cited

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by the defendant. In that case the plaintiff was allowed to recover the extra or usurious interest which he paid on the obligation on which he was surety for the defendant, but not allowed to recover the extra interest which he paid on his own obligation given to raise money with which to take up the obligation on which he was surety. The case of *Hargrave v. Lewis*, 3 Ga. 162, also cited by the defendant, is not to the point, as in that case the bill charged that the surety colluded with the payee to have judgment pass against him for the debt and usury, to defeat the orator's right to have the usury deducted on the original obligation, which implies that the surety knew it was not the intention of the principal to submit to the payment of the usury. No such fact is hinted at in the case at bar.

Judgment affirmed.

STATE V. BISHOP.

(51 Vt. 287.)

Criminal law — burglary — railroad depot — "warehouse."

A railroad depot is a "warehouse" within the meaning of the statute of burglary, although such buildings were unknown when the statute was enacted. (See note, p. 691.)

CONVICTION of burglary. The opinion states the facts.

E. W. Smith, for the prisoners. The breaking and entering of a railroad depot is not burglary at common law. 2 Russ. Crimes, 2. Nor under the statute. Gen. Sts. chap. 113, sec. 7; *State v. Jones*, 33 Vt. 443; *State v. Cook*, 38 id. 439; *Slade v. Carney*, 19 N. H. 185. Penal statutes are strictly construed. *State v. Cooper*, 16 Vt. 551.

Henry C. Ide, State's Attorney, for State.

REDFIELD, J. The respondents are charged in the indictment with the crime of feloniously and burglariously breaking and entering, in the night-time, the depot and storehouse of the railroad with intent, etc., to steal, and that they did then and there feloniously and burglariously steal, etc.

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I. The court charged the jury "that if they found that the respondents broke and entered said depot and storehouse of the railroad in the night-time with intent to steal, and did steal therefrom, they should pronounce them guilty, and that they would be guilty of burglary."

It is claimed that forcibly breaking and entering a railroad depot and storehouse, does not constitute burglary under our statute. At the time the statute was passed defining the crime of burglary and enlarging the common-law definition, no such thing as a railroad depot was known in this State. Depots and storehouses for merchandise existed along the wharves of Lake Champlain, and were generally among merchants called *warehouses*; and that term was recognized and used in the statute. But since that time the land has become navigable by rail, and depots and storehouses for goods, wares and merchandise have been constructed along our railways, and perform the same office as did the storehouse or *warehouse* on the wharves of the lake. The legal character and liability of the keeper of the goods, when transit is ended, becomes changed, after proper notice to the owner or consignee, and he is liable only as *warehouseman* — as the keeper of goods and wares in the warehouse. The building broken into, in this case, seems to have been used as a passenger and freight depot; in it were offices for the sale of tickets, for receiving and discharging freight, a place for the comfort of passengers, and a place for the safe deposit of goods. In it were "offices" and a "warehouse." Names change often with the habits and customs of the people; it is not so important to determine the *name*, as the *thing*, wherein burglary, by the statute, may be committed. That subtle astuteness that would discover a difference where none exists, and would find a way of escape from the just penalties of crime through narrow crevices of the law, serves no useful purpose. When one is charged with crime in plain language, and convicted by honest men, upon legal evidence, it is better that he work out the penalty to the relief of the public and the safety of the State.

[Omitting minor points.]

Judgment affirmed.

NOTE BY THE REPORTER. — In *Taylor v. Goodwin*, 4 Q. B. D. 228, it was held that a person riding a bicycle on a highway, at a pace dangerous to passers, may be convicted of furiously driving a carriage, under a statute passed before bicycles were invented. The court said: "The legislature clearly desired to prohibit the use of any sort of carriage in a manner dangerous to

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the life or limb of any passenger." "Although bicycles were unknown at the time when the act was passed, it is clear that the intention was to use words large enough to comprehend any kind of vehicle which might be propelled at such a speed as to be dangerous."

In *Rea v. Handy*, 6 T. R. 286, the defendant was indicted under the statute for "acting, representing and performing a certain entertainment of the stage called tumbling." The statute forbade "interludes, tragedies, comedies, operas, plays, farces and other entertainments of the stage." Tumbling was not known when the act was passed. KENTON, Ch. J., held that it was not an entertainment of the stage, and remarked: "This is a penal act of parliament, and we cannot extend it to entertainments that did not exist when the statute was made."

Dr. Lieber, in "Hermeneutics," page 96, says: "In September, 1837, a case of considerable importance was tried in England, in which the question was whether a steamship comes within the meaning of the act which regulates the London pilotage—an act passed when there were no steam vessels claiming parliamentary attention." "The case came before Mr. BALLANTYNE in the shape of an information against Captain J. Anderson, master of the North Star steamship, who was charged as having acted as a pilot on board, after J. H. Bennett, a pilot duly licensed by the Trinity-house, had offered to take charge of the steamer, whereby the defendant had forfeited the sum of £15 16s. 9d., being double the amount of the sum which would have been demandable for the pilotage of the ship. Mr. BALLANTYNE referred to the act, and said he was of opinion that steamers ought to be exempt by the common sense of things. Pilots had to receive a certain education before they were licensed; but however expert they might be in conducting sailing vessels, it might require a different degree of skill to conduct a steam vessel. A pilot superseded a master in command of a ship, and the master of a steamer, it must be supposed, was appointed because he understood the nature of the engines and machinery. He did not understand how the new science was to be engrafted on the ancient custom. However expert a pilot might be as a seaman, he might be a very bad engineer. The complaint was then proved, and, as the act left the magistrate no discretion, the captain was fined in the penalty above stated, and costs."

In *Monck v. Hilton*, 2 Ex. Div. 268, it was held that an exhibitor of "spiritualistic phenomena" might be punished as a "rogue and vagabond," under a statute of Geo. 4, applying to persons "using any subtle craft, means or device, by palmistry or otherwise, to deceive and impose on any of his majesty's subjects." It was argued that the statute was enacted against rogues, especially gypsies.

FIRST NATIONAL BANK OF NORTH BENNINGTON v. WOOD.

(51 Vt. 473.)

Negotiable instruments — giving notice of protest.

Notice of protest was posted on the day of maturity, addressed to the indorser at his former residence, and thence forwarded on the following day by the same mail to his residence, where he received it. *Held*, sufficient.

ASSUMPSIT. The facts are stated in the opinion. The plaintiff had judgment below.

Burton & Munson, and Miner & Fenn, for defendant.

R. Howard, and Gardner & Harmon, for plaintiff.

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Ross, J. The only question made as to the liability of the defendant on the facts reported, is in regard to the sufficiency of the notice to charge him as an indorser of a negotiable promissory note. When the first transactions out of which the note in suit had its origin transpired, the defendant resided at East Dorset, Vermont. When the note in suit was given he had changed his residence, unknown to the plaintiff, to Concord, Massachusetts. On the day the note matured, the plaintiff mailed to the defendant, addressed to East Dorset, a notice of the presentation of the note to the maker for payment, its non-payment and protest, which arrived at East Dorset that evening, and was forwarded by the post-master, by the next day's mail, to the defendant at Concord, Massachusetts, at which place the defendant received it by due course of mail. The plaintiff, by the law merchant, had until the day following the day on which the note fell due, to mail notice of its presentation, non-payment and protest, to the defendant at Concord, Massachusetts. By so doing he would have exercised such diligence as the law demands, and have fixed the liability of the defendant as indorser, although the defendant never received the notice. The defendant having actually received the notice through the mail as early as he would if the plaintiff, in the exercise of due diligence, had mailed it to him at North Bennington on the day following the maturity of the note, addressed to Concord, Massachusetts, has not been prejudiced, nor put to a disadvantage in pursuing the maker of the note, from the fact that the plaintiff addressed the notice to East Dorset instead of Concord, Massachusetts. If the notice had never in fact reached the defendant, or if it had not seasonably reached him, it is probable that the failure of the plaintiff to ascertain the defendant's residence at the time it discounted the note, and its addressing the notice to him at East Dorset, showed such a lack of diligence as would have discharged the defendant. So, too, where the law requires the notice to be delivered to the indorser at his residence or place of business, and there is a misdelivery of the notice through lack of diligence by the holder in ascertaining the proper place of delivery, the indorser is discharged. But if the indorser receive the notice seasonably, though misdelivered through lack of diligence, his liability remains. The holder of the note may fix the liability of the indorser by showing that he used due diligence to give notice, although notice never in fact reached the indorser, or by showing that notice was in fact received by the indorser in due season. *Bank of United States v.*

Corcoran, 2 Pet. 121; *Dickins v. Beal*, 10 id. 572; *Bradley v. Davis*, 26 Me. 45; Story Prom. Notes, §§ 322, 347; Para. Notes and Bills, 483; *Cabot Bank v. Warner*, 10 Allen, 522; *Manchester Bank v. Fellows*, 8 Fost. 302. The purpose of the law in requiring notice to be given is, that the indorser may be informed of the presentation and non-payment of the note, and that the holder is looking to him for payment, that he may be able to secure himself against those who may be liable over to him. All the rules requiring the holder to use diligence to ascertain the residence of the indorser, and to leave notice at his place of business or residence, when they reside in the same town, or to mail notice as soon as the day following the day of the maturity of the note, addressed to him at his place of residence, when they reside in different towns, are made and enforced that the indorser may be informed that his liability on the note has not been discharged by the party whose duty it was to pay the note at maturity. When, therefore, the indorser in fact receives notice in due season that the note has been duly presented for payment and protested, the purpose of the law has been accomplished, although the holder of the note has not complied with one of the established rules in regard to the use of diligence in giving notice.

Judgment affirmed.

HARRIS V. WAITE.

(51 Vt. 481.)

Sale — implied warranty — fitness for particular use.

On a sale of goods by a manufacturer for a particular purpose, there is an implied warrant of fitness for that purpose; but the manufacturer is not bound to furnish the best that are or can be made, but only such as are usually made and used, and as are reasonably fit for the purpose.*

ASSUMPSIT for price of gas meters manufactured and sold by the plaintiff. Defense of breach of implied warranty in their construction. The plaintiff had judgment below.

Field & Tyler and *E. J. Phelps*, for defendant. There was an implied warranty that the meters would register gas accurately. When one undertakes to supply an article for any particular purpose

* See note, 24 Am. Rep. 104.

Priest v. Cone.

he warrants it fit and proper for such purpose. Story on Sales, 389; *Beals v. Olmstead*, 24 Vt. 114; PIERPOINT, Ch. J., in *Pease v. Sabin*, 38 id. 435.

Davenport & Eddy, for plaintiffs.

BOYCE, J. (Omitting a minor point.)

The defense made is, that the meters were faulty in their construction. It is not claimed that there was an express warranty of them; but it is claimed that there was an implied warranty against the defects complained of. Where goods are ordered from a manufacturer for a particular purpose there is an implied warranty that they shall be fit for the purpose for which they are ordered. But the manufacturer, under a general order, is not bound to furnish the best goods of the kind ordered that can be or are manufactured. He is only required to furnish goods of the kind and quality usually manufactured and used, and such as are reasonably fit and proper for the purpose for which they are ordered. From the facts found by the County Court, the meters furnished by the plaintiffs answered those requirements. And without considering the legal effect upon the rights of the parties of the retention and use of the meters by the defendant, and of his neglect to return them to the plaintiffs for repairment when requested, he is liable upon the ground that the meters furnished were of the kind and quality required by the orders.

Judgment affirmed.

PRIEST V. CONE.

(51 Vt. 435.)

Marriage—wife's contract for family necessities.

A contract by a married woman for necessities sold on the credit of her estate, for herself and family, and charged thereon may be enforced against it in equity to the extent of her interest. (*See note, p. 697.*)

BILL against a married woman to charge her separate property for necessities for family use sold to her on her request and credit, and on the credit of her property, and used by her and her family. The complainants had sold defendant's husband similar goods on

Shurtloff v. Stevens.

Wells, in *Separate Property of Married Women*, thus states the conditions of a contract for necessities binding a married woman: "1. She must have a separate estate because she cannot be charged personally; 2. The credit must be given to her and not to her husband; 3. She must intend to make it a charge on her estate; 4. The goods furnished must be suitable and necessary." § 497.

In *Campbell v. White*, 22 Mich. 178, the wife had for some time purchased necessities of the plaintiff which were charged to her husband; at length the defendant's husband notified the plaintiff that he would not pay for any more goods purchased by her; the plaintiff informed her of this notice, and goods thereafter got by her would be charged to her; she assented to this, and orally promised to pay for all goods thereafter got by her; and she repeatedly afterwards promised to pay for the goods so charged to her. *Held*, that her separate estate was liable. The court said: "Her promise to pay for the articles was an undertaking to pay from her separate property, and one she was competent to make."

Young v. Smith, 9 Bush. 421, is a decision somewhat like the principal one. There, however, the wife in writing ordered her trustee to pay for sheep out of her separate property, the sheep being used upon her farm for the support of herself and her family. The court said: "Mrs. Young has no right to alienate, incumber, or dispose of in any way the estate in the hands of the trustee from which the income for the maintenance of herself and children is derived; but the issues and profits of the estate the trustees are compelled to account for and pay to Mrs. Young without the order or sanction of a court of equity. When this income is received by the wife she may use it by investing it in other property, or in providing herself and family with the comforts of life. This income of the wife, and the property acquired by an investment of it, retains its character as separate estate so long as the wife owns or holds it, and the chancellor will see that she is protected in the free use and enjoyment of it as against the creditors of the husband or her own improvident acts; but to say that where she anticipates a portion of this income in what was proper and necessary for her own maintenance and that of her family, neither the wife, trustee, nor chancellor can sanction it, would be such a restriction of its enjoyment as might deprive the wife of what was absolutely requisite for her subsistence."

See *Wilson v. Herbert*, 12 Vroom, 454; *S. C.*, 32 Am. Rep. 243.

SHURTLEFF V. STEVENS.

(51 Vt. 501.)

Slander and libel — privileged communication.

The plaintiff and defendant were congregational ministers and members of a county association of such ministers, recognized by congregational churches, and membership in which was considered among the churches as evidence of good ministerial standing. This association, at the instance of defendant unanimously adopted resolutions implying that the plaintiff had been guilty of untruthfulness, deception, and creating disturbance among the churches, withdrawing fellowship from him temporarily, inviting him to appear and show cause why he should not be dismissed without the recommendatory letter to other churches usually granted to members in good standing, and directing that the resolutions be sent to certain denominational newspapers. The defendant spoke and voted for the resolutions. The resolutions were published in those newspapers, one of which circulated throughout New England and the other in Vermont, and which were the recognized denomina-

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tional organs. For several years previous, reports of difficulties between plaintiff and his parishioners were in circulation, and defendant had received letters from ministers and parish committees in various places where plaintiff was preaching, giving unfavorable accounts of his career, and some of them speaking of him as unfit for the office and work of the ministry, and asking defendant to do what he could to restrain him. *Held*, that defendant's action, and the publication of the preamble and resolutions, were privileged, and the burden was on the plaintiff to prove malice. (*See note, p. 708.*)

ACTION for libel. The opinion states the facts. The plaintiff had judgment below.

Davenport & Eddy, for the plaintiff. The publication was not privileged. Even if meeting the requirements of a privileged publication in other respects, it was too widespread. Townshend on Slander, §§ 299-247; *Fowles v. Bowen*, 30 N. Y. 20; *Popham v. Pickburn*, 7 H. & N. 89; *Joannes v. Bennett*, 5 Allen, 169; *Krebs v. Oliver*, 12 Gray, 239; *Gassett v. Gilbert*, 6 Gray, 94; *Aldrich v. Press Printing Co.*, 9 Mass. 133.

C. B. & C. F. Eddy and *J. M. Tyler*, for defendant.

POWERS, J. This is an action on the case for libel, and was tried on the plea of not guilty.

The Windham County Association of Congregational ministers, of which the plaintiff and defendant were both members, at a regular meeting held at West Townshend, on the 15th and 16th days of May, 1877, adopted the following preamble and resolutions, viz.:

“*Whereas*, Charges of untruthfulness, deception, and creating disturbance among the churches, have been made against Rev. David Shurtleff, a member of this body; therefore,

“*Resolved*, That we hereby withdraw fellowship from him till the seventh day of August next, at which time he is invited to appear before our body at Wilmington, and show reason why he should not be finally dismissed without papers.

“*Resolved*, That the scribe be instructed to send a copy of this minute to the brother, and also to *The Congregationalist* and *The Vermont Chronicle*.”

The defendant actively promoted, by speech and by vote, the adoption of the foregoing preamble and resolutions.

A large mass of evidence was introduced tending to show the history of the plaintiff's conduct in different places where he had

officiated as pastor of Congregational churches, and where difficulties between him and his parishioners had arisen. The defendant's evidence tended to show that for several years prior to 1877, reports of these difficulties were in circulation, and as early as 1873, the defendant was written to by the parish committee of the church in Alstead, N. H., asking for the standing, as a minister, of the plaintiff, who was then preaching as a supply at that place, and saying that unfavorable reports of him were circulating in that locality. The defendant answered the letter, giving the information called for. The defendant received letters, from the officers of the church at Brownington, Vt., where the plaintiff had been stationed as a minister, detailing an unfavorable history of his ministerial career there, which resulted in his dismissal from the pastoral relation, without the usual credentials attesting the confidence of his society in him as a clergyman. Similar information and letters of inquiry were received by the defendant from Massachusetts, where the plaintiff was officiating as a clergyman. On the 5th day of May, 1877, Rev. H. Parker, of Shirley village, Massachusetts, addressed a letter to the defendant, in which, speaking of the plaintiff, he said: "If you *can*, do stop this man from making more troubles in the churches. He is *unfit* for the office and work of the ministry. He belongs to no organization here, and we cannot reach him." Shortly after the receipt of this letter, the proceedings of the Windham Association were initiated. The defendant requested the court in substance to rule and hold that the circumstances under which and the occasion on which he did what he did in promoting the adoption of the resolutions at West Townshend and procuring their publication, were conditionally privileged, and that no recovery could be had unless the plaintiff satisfied the jury that the defendant was actuated by malice. The defendant further claimed that it was the province of the court to determine whether there was any evidence of malice, and if none was offered, a verdict should be ordered for the defendant. The court overruled these claims, and held that the publication of the preamble and resolutions in the two papers named, was libelous and actionable and ordered a verdict for the plaintiff.

Herein was error. Two questions are properly raised on this branch of the case: First. Was the defendant's action before the association, and as a member of it, *prima facie* privileged? Second. Was the newspaper publication of the result of that action in like manner privileged?

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The subject of privileged communications has been much discussed by courts and commentators in England and America within the past fifty years. In 1834, the Court of Exchequer, in *Toogood v. Spyring*, 1 C., M. & R. 181, speaking through Baron PARKE, one of the most learned of English judges, formulated a legal canon that has been adopted on both sides of the Atlantic since, as embodying the true ground upon which the publication of defamatory matter, whether written or oral, is privileged by the occasion or the circumstances under which it is made. In that case the court said: "In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defense depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." And in elaborating the proposition, the court, further on in the opinion, said: "I am not aware that it was ever deemed essential to the protection of such a communication that it should be made to some person interested in the inquiry, *alone*, and not in the presence of a third party."

In 1855, in *Harrison v. Bush*, 5 El. & B. 344, the Court of Queen's Bench—Lord CAMPBELL, Ch. J., delivering the opinion—after reaffirming the same doctrine in language similar to that used by Baron PARKE, *supra*, said: "'Duty,' in the proposed canon, cannot be confined to legal duties which may be enforced by indictment, action or *mandamus*, but must include moral and social duties of imperfect obligation." Still later, in 1863, the Court of Common Pleas, in *Whiteley v. Adams*, 15 C. B. (N. S.) 417, ERLE, Ch. J., delivering the opinion, said: "Judges who have had, from time to time to deal with questions as to whether the occasion justified the speaking or the writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty, or what amount of interest will afford a justification, but all are clear that

it is a question for the judge to decide; and I am clear that the letters in question, seeing the circumstances under which they were written, do not show what in law amounts to malice. I fully concur in the doctrine referred to in Starkie on Slander, that it is important to get at the true character of persons you are obliged to be in communication with and to treat with confidence." The law as to privileged communications was formerly more restricted than it is at the present day. The case of *Peacock v. Sir George Reynal*, 2 Brownl. & G. 151, is an early and a very strong example. The rule has since become gradually more extended, upon the principle that it is to the general interest of society that correct information should be obtained as to the character of persons in whom others have an interest. If every word which is uttered to the discredit of another is to be made the ground of an action, cautious persons will take care that all their words are words of praise only, and will cease to obey the dictates of truth. The privilege of criticising and discussing the words and acts of public men has, in modern times, been very widely extended; and so also has the rule as to giving information concerning private individuals, when given *bona fide*, and to a person having an interest in making the inquiry, and in my judgment, with very good reason." The court in terms approved the doctrine laid down in *Toogood v. Spyring* and *Harrison v. Bush*, above cited.

In *Whiteley v. Adams*, the doctrine of privilege was applied to a case involving these facts: The plaintiff, Whiteley, a member of Rev. Mr. Cleaver's congregation, having a controversy with one Fowler, Rev. Cleaver wrote to the defendant, a brother clergyman, asking him to act with Mr. Cleaver as an arbitrator of the disputed matters between Whiteley and Fowler. The defendant declined by letter to Mr. Cleaver, and in giving his reasons, imputed gross misconduct to Whiteley, adding, "I think it my duty to unmask him to you." An action of libel was brought by Whiteley against the defendant, predicated upon this letter, and the court held that the letter was privileged on the ground that the defendant wrote it in what he believed to be the honest discharge of a social and moral duty, and on a subject in which he and Rev. Mr. Cleaver each had an interest.

The latest English case in point is *Clark v. Molyneux*, Law Rep. 3 Q. B. D. 237, decided in December, 1877. In that case, the plaintiff, Rev. Nassau Clark, was advertised in the public prints to preach in Rev. C. Smith's church, in a neighboring parish, one of a series of

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eight lenten sermons. The defendant, a member of a sister church, having received from credible sources information that led him to honestly believe that Rev. Clark had been guilty of the grossest immoralities, which unfitted him to enjoy the confidence of the church at Newton, where he was to preach on an occasion of special interest, communicated this information to Mr. Smith, the vicar of the church at Newton, and also to his own curate, in order to take his advice, and also to Rev. Mr. Maud, vicar of the church, in charge of which the plaintiff had been temporarily placed during Mr. Maud's absence on the continent. An action having been brought, the court held that the defendant's communications were privileged, under the circumstances, unless the plaintiff could show that the defendant used his privilege for some indirect or wrong motive.

The last two cases show how the doctrine is applied by the highest courts in England, and demonstrate a progressive tendency in those courts to a more liberal construction of the canon announced by Baron PARKE in *Toogood v. Spyring*, as the changing usages, wants and interests of society demand.

To come a little nearer home and nearer to the case at bar, the case of *Farnsworth v. Storrs*, 5 Cush. 412, may be referred to. In that case Mrs. Farnsworth had been charged with immoral conduct while a member of the Congregational church in Braintree, Mass., of which the defendant was pastor. Having been disciplined according to the usages of the church, Mrs. Farnsworth was expelled, and the resolutions reciting the action of the church were publicly read to the congregation by the pastor, by order of the church. The pastor was sued for a libel. Chief Justice SHAW, speaking of the authority of churches to act in such cases, says: "Amongst these powers and privileges established by long and immemorial usage, churches have authority to deal with their members for immoral and scandalous conduct, and for that purpose to hear complaints, to take evidence and to decide; and upon conviction to administer proper punishment by way of rebuke, censure, suspension or excommunication. To this jurisdiction, every member by entering into the church covenant submits, and is bound by his consent. The proceedings of the church are *quasi* judicial, and therefore those who complain or give testimony, or act and vote, or pronounce the result orally or in writing, acting in good faith and within the scope of the authority conferred by this limited jurisdiction, and not falsely or colorably, making such proceedings a pretense for covering an intended scandal,

are protected by law." A similar rule is laid down in Townshend on Slander and Libel, section 237: "Every one who is aggrieved or who has reasonable and probable cause to believe himself aggrieved, may in good faith seek redress from any body, officer or individual, having jurisdiction, power or authority to redress the wrong." To the same effect, 1 Hilliard on Torts, 355: "So words spoken or written in the regular course of church discipline, or before a tribunal of a religious society, to or of members of the church or society, are, as among the members themselves, privileged communications and not actionable without express malice." The same rule of privilege has been extended to the case of charges preferred in good faith by one member of a lodge of Odd Fellows against another for violating rules of the order. *Streetz v. Wood*, 15 Barb. 105.

Now to apply the doctrine which has been announced in these cases, and which meets our approval, to the case in hand. The plaintiff became a member of the Windham County Association voluntarily. He entered into its covenant and subscribed to its rules. Under its covenant and rules it had rightful jurisdiction to investigate charges of unministerial conduct affecting its members, and on conviction to administer proper punishment. The good name and good standing of every member of the association was a matter of common interest to all the rest. The members were all representative men, largely responsible for the growth and prosperity of the churches under their charge. This association was an instrumentality whereby they could advance the common interests of denominational work in Windham county; and by virtue of its relationship to like organizations elsewhere, it was a factor in the prosperity of the denomination throughout the land. Not only this, but the general public not immediately related to these clergymen by the ties of church covenant or society relationship, are more or less directly within the range of that moral influence which they are charged to exert. Thus the general cause of public morality which underlies all good government, and which every good citizen, be he priest or layman, is bound to promote, is affected by the fidelity with which ministers of the gospel discharge the high trust of their appointment. In order to be successful public teachers of morality, they must be unspotted public exemplars of it. Hence, if it be suspected that a wolf in sheep's clothing has invaded their ranks, and sits at their council board, it is not only for the *interest* of all the members of the association to know the fact, but it is their *imperative duty*, to make inquiry and *ascertain the fact*.

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They owe such duty to the plaintiff as a brother member, if he is charged with scandalous conduct, to the end that his innocence may be established. They owe it to themselves, lest by indifference they give apparent approval to his conduct. Their intimate official relation to the plaintiff in the cause of their common work leaves them no other alternative; and if in making such inquiry and in acting upon the subject-matter of it, they proceed with honesty of purpose and act from a sense of duty, the law protects them.

Secondly. The acts of the defendant, so far as he had to do with the charges against the plaintiff at West Townshend, being *prima facie* privileged, it remains to inquire whether he forfeited the protection of that privilege by authorizing the publication of the result of that meeting in the newspapers named. In other words, was the subject-matter of inquiry before the association at that time, one that concerned the association alone, and one in which the general public had no interest? That the character and conduct of a clergyman is a subject of public interest, not limited to the narrow circle of his parish, church, or denominational brotherhood, is abundantly established by adjudged cases.

In 1865, this question was before the Court of Queen's Bench, in England, in the cases of *Kelly v. Sherlock*, and *Kelly v. Tynling*, Law Rep. 1 Q. B. 686, 699. The same person, a clergyman, was plaintiff in each case, and each case was an action for libel against the proprietor of a newspaper, for publishing, with editorial comment, defamatory matter of and concerning the plaintiff. It appeared that the plaintiff had some controversy with one of his church wardens, and also with his organist, and had preached one or two sermons reflecting upon the appointment of a Roman Catholic chaplain to the Liverpool borough gaol, and the election of a Jew, by the town council of Liverpool, to be their mayor. In the first case Baron BRAMWELL, in summing up the evidence to the jury, told them that, "anything which is calculated to bring a person into ridicule, hatred, or contempt, is a libel. Although that is true as a general rule, yet it is also true, and happy it is that it is true, that every man has a right to discuss matters of public interest. A clergyman with his flock, an admiral with his fleet, a general with his army, a judge with his jury, we are all of us the subject for public discussion. So also is it matter of public interest, the dispute between the plaintiff and his organist, and the way in which the church is used, they are all public matters and may be publicly discussed."

In *Kelly v. Tinling* the defendant published in his paper a correspondence between the plaintiff and one of his church wardens, in which the warden complains to the plaintiff of the manner in which he suffers books to be sold to the congregation by his errand boy during divine service, and the way in which the vestry room is suffered to be used, etc. The jury returned a verdict for the defendant, and the case came before the Queen's Bench on a motion for a new trial, on the ground that the publication by the defendant in his paper was not "in a matter of public interest." The words between quotation marks, extracted from the motion, are given so that it may be seen that the court were called on to confront the precise question we have to deal with in the case at bar. COCKBURN, Ch. J., said, in overruling the motion: "I cannot think that a dispute between a clergyman and his church warden, as to what he allows to be done in church during divine service, and the uses to which he puts part of it, namely the vestry room, which were the matters involved in the correspondence between them, is not a subject of public interest. The maintenance of decency and propriety in conducting public worship, and of the sanctity of the sacred edifice and all connected with it, is surely a matter of the greatest public concern. The very use of the term 'public worship' shows this." And to recur to the former of these cases, *Kelly v. Sherlock*, the summing up of BRAMWELL, B., above quoted, was read to the court in *Kelly v. Tinling*. Alluding to it, COCKBURN, Ch. J., said: "Every word of the summing up of the learned judge, which has been read, seems to me to have been said with the most perfect propriety." These cases bring prominently and pointedly into the foreground, the proposition that the conduct of church affairs is a matter of general public interest that will authorize publications concerning it in the public prints. But these cases also hold that such publication must be fair and temperate — that there must be no "excess of comment." The English cases, however, are not the only source of light on this subject. The same doctrine is fortified by the great strength of Chief Justice SHAW's opinion. In *Farnsworth v. Storrs*, *supra*, he held that the defendant was justified in promulgating the action of the church, publicly to his congregation. In the later case of *Barrows v. Bell*, 7 Gray, 301, 313, the defendant caused to be published in the *Boston Medical and Surgical Journal*, an article concerning the expulsion of the plaintiff from the Massachusetts Medical Society. Chief Justice SHAW laid down this salutary rule:

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"So many municipal, parochial, and other public corporations, and so many large voluntary associations, formed for almost every lawful purpose of benevolence, business, or interest, are constantly holding meetings, in their nature public, and so usual is it that their proceedings are published for general use and information, that the law, to adapt itself to this necessary condition of society, must of necessity admit of their public proceedings, and a just and proper publication of them, as far as it can be done consistently with private right."

Now if the manner in which a clergyman conducts his church service and uses his church edifice is a proper matter for comment in a newspaper of general circulation, *a fortiori*, "untruthfulness, deception, and creating disturbance in churches" are charges of personal unfitness that justify public comment in a denominational publication. No doubt a publication might be so made as of itself to bear palpable evidence of malice—as if it be made in an unusual number of papers having circulation without the circle of readers who would be likely to take an interest in the facts, or couched in extravagant language, or abounding in vilification. But where, as in *Barrows v. Bell*, it is made in a professional journal, and concerning a professional matter, or as in this case, in a denominational journal, and concerning a denominational matter, it can hardly be said *per se* to furnish evidence of malice. The exceptions state that *The Congregationalist* and *The Chronicle* circulate among Congregationalists and that they are organs of Congregational churches and organizations, and institutions connected with said churches. From this statement of their circulation and relationship to the Windham County Association, it is manifest that the publication of the defamatory matter complained of, was made to persons who had a direct interest in the proceedings against the plaintiff. This denomination clearly have a vital interest in the character and standing of its ministers. But if the publication reached the general public, the privilege is not lost. It is to be noticed that no editorial or other comment accompanies the publication, and nothing appears in it calculated to prejudice a fair trial of the charges at the time and place appointed. The law seems to place the publication of the proceedings of parliament, courts of justice, and *quasi* judicial tribunals upon the same level of protection. The only limitation that attaches to the privilege is, that the publication must not be made for the purpose of inflicting an injury but to promulgate facts which duty or interest requires to be promulgated.

Campbell v. Spottiswoode, 3 B. & S. 709; *Wason v. Walter*, Law Rep. 4 Q. B. 74; *Lawless v. Anglo-Egyptian Cotton Co.* id. 260; *Usill v. Hales*, Law Rep. 3 C. P. D. 319; *Kelly v. Sherlock*, *Kelly v. Tinling*, *Farnsworth v. Storrs*, and *Barrows v. Bell*, *supra*.

The rule is not, however, to be misapprehended. It is *not* the law, that because a man fills a station before the public eye, he becomes thereby a target at which all the artillery of ridicule, ill will, or malice, may be leveled. He may be assailed when duty or interest demands it, and then only under the rules of fair, temperate, conscientious criticism. Public station may ever be purified, never vilified.

The burden of proof to show that the publication is outside the privilege, or, in other words, is actuated by malice, is upon the plaintiff. *Clarke v. Molyneux*, *supra*; *Spill v. Maule*, Law Rep. 4 Ex. 232; 1 Am. Lead. Cases, 193; Townshend on Slander, 386; 2 Ad. on Torts, 931. It was error to refuse the defendant's request as to the burden of proof upon the question of malice, and in charging the jury that the defendant must make out that he acted from a sense of duty.

[Omitting minor points.]

Judgment reversed, and new trial awarded.

NOTE BY THE REPORTER. — There has been a good deal of debate as to what constitutes a privileged communication, when the communication is not made in answer to inquiries, or in the course of service, but simply volunteered, and as to what constitutes the duty or the interest which will invest the communication with the privileged character.

Overhead v. Richards, 2 C. B. 569, was a much mooted case. The mate of a ship sent to B, a stranger, a letter charging A, the captain, with gross misconduct, namely, intoxication. B showed the letter to D, the owner, who thereupon dismissed A. *Held*, that the showing of the letter was privileged. By TINDAL, Ch. J., and ERLE, J. *Contra*, by COLTMAN and CRESSWELL, JJ. The case was twice argued. TINDAL, Ch. J., said he had instructed the jury that "they should find their verdict for the defendant if they thought the communication was strictly honest on his part, and made solely in the execution of what he believed to be a duty, but for the plaintiff if they thought the communication was made from any indirect motive whatever, or from any malice against the plaintiff." "If the danger disclosed by the letter, either to the ship or cargo, or the ship's company, had been so immediate as that the disclosure to the ship owner was necessary to avert such danger, then upon the ground of social duty, upon which every man is bound to his neighbor, the defendant would have been not only justified in making the disclosure, but would have been bound to make it. A man who received a letter informing him that his neighbor's house would be plundered and burnt on the night following by A and B, and which he himself believed, and had reason to believe to be true, would be justified in showing that letter to the owner of the house, though it should turn out to be a false accusation of A and B." "I do not find the rule of law is narrowed and restricted by any authority, that a person having information materially affecting the interests of another, and honestly communicating it, in the full belief, and with reasonable grounds for the belief, that it is true, will not be excused, though he has no personal interest in the subject-matter. Such a restriction would surely operate as a great restraint upon the performance of the various social duties by which men are bound to each other, and by which society is kept up." Citing *Pattison v. Jones*, 8 B. & C. 578, and *Child v. Agleck*, 9 id. 408, cases where a former master, unsolicited, wrote a letter to

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one about to engage his former servant. "In the present case, the defendant stood in a different situation from any other person; he was the only person in the world who had received the letter, or was acquainted with the information contained in it. He cannot therefore properly be treated as a complete stranger to the subject-matter of the inquiry, even if the rule excluded strangers from the privilege." "I think it was the duty of the defendant not to keep the knowledge he gained by this letter to himself, and thereby make himself responsible in conscience, if his neglect of the warnings of the letter brought destruction upon the ship or crew." COLTMAN, J., put his opinion on the ground that the exigency did not require the showing of the letter until the defendant had taken steps to ascertain its truth; and CRESSWELL, J., thought that the defendant and the ship owner did not stand in such a position toward one another as that the latter had any right to expect confidential information and advice from the former, and that there was no moral duty to give the information except in answer to inquiries. The latter said, there was another "moral duty, viz., not to publish defamatory matter unless you know it to be true."

In *Somer ville v. Hawkins*, 10 C. B. 563, the defendant dismissed the plaintiff from his service on suspicion of theft, and calling in two of his other servants, told them, in his presence, that he had dismissed him for theft, and cautioned them not to speak to him any more or he should think them as bad as he. This was held privileged. MAULE, J., said: "We think the case falls within the class of privileged communications, which is not so restricted as it was contended on behalf of the plaintiff. It comprehends all cases of communications made *bona fide*, in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the party using the words. In this case, supposing the defendant himself to believe the charge — a supposition always to be made where the question is whether the communication is privileged or not — it was the duty of the defendant, and also his interest, to prevent his servants from associating with a person of such a character as the words imputed to the plaintiff; as such association might reasonably be apprehended to be likely to be followed by injurious consequences, both to the servants and to the defendant himself."

In *Woodward v. Lander*, 6 C. & P. 548, the defendant had written to the Postmaster-General, complaining of the plaintiff, a postmaster, that he was negligent and guilty of improper conduct toward him, and of extortionate conduct towards others in his office. ALDERSON, B., said: "If it was written as a *bona fide* complaint, made to obtain redress in the proper quarter, the defendant would be entitled to a verdict, although the contents of the letter may not be strictly true." "This is not strictly what is called a privileged communication, but is rather a communication privileged by the occasion, and if it was made *bona fide* the particular expressions ought not to be too strictly scrutinized, provided the intention of the defendant was good; but if the concluding part of the letter was introduced gratuitously to injure the plaintiff's character, the plaintiff will be entitled to recover."

In *Wright v. Woodgate*, 2 Crompt. M. & R. 573, the defendant was solicitor of the plaintiff, a minor. The plaintiff informed him that he proposed to change his solicitor. Thereupon the defendant wrote to the plaintiff's next friend (who was responsible for costs), dissuading him from giving any directions, and alleging that one to whom the plaintiff had been bound as an apprentice had made him a present of his indentures, because he was worse than useless in his office. Held, privileged. PARKE, B., said: "The proper meaning of a privileged communication is only this: that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove that there was malice in fact — that the defendant was actuated by motives of personal spite or ill-will, independent of the occasion on which the communication was made." At the trial, ABINGER, Ch. B., had left it to the jury to say whether the sentence about the plaintiff's apprenticeship was written to prejudice the plaintiff, and if not, he directed them that they should find for defendant.

In *Harrison v. Bush*, 5 Ell. & B. 344, an elector signed a memorial to the home secretary, praying the removal of the plaintiff as justice of the peace, on account of official misconduct which it imputed to him. Lord CAMPBELL said: "A communication made *bona fide* upon any subject-matter in which the party communicating has an interest, or in reference to which he has a duty is privileged if made to a person having a corresponding interest or duty, although it contains crimimatory matter which without this privilege would be alanderous and actionable. In the present case little need be said to show that the communicator had both an interest and a duty

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on the subject-matter of the communication. Assuming that Dr. Harrison had misconducted himself as a magistrate in the manner alleged, all the electors and inhabitants of Frome had suffered a grievance by a magistrate having fomented the riot instead of quelling it, and having endangered life and property within the borough. They have an interest that they may not longer remain subject to the jurisdiction of a magistrate who so violates the law. Again, if Dr. Harrison had so misconducted himself as a magistrate, he had committed an offense, and it was the duty of those who witnessed it to try by all reasonable means in their power that it should be inquired into and punished."

In *Whitely v. Adams*, 15 U. B. (N. S.) 392, cited in the principal case, and the facts of which are there stated, ERLE, Ch. J., said: "If the circumstances bring the judge to the opinion that the communication was made in the discharge of some social or moral duty, or on the ground of an interest in the party making or receiving it, then if the words pass in the honest belief on the part of the person writing or uttering them, he is bound to hold that the action fails." "It seems to me that under all the circumstances it was the social and moral duty of the defendant as a clergyman, toward Mr. Cleaver as another clergyman, to give him true and correct information on the subject on which he was writing. I say emphatically that I think he was discharging a social and moral duty; and I also think it was his interest, if he wished to stand well with those whose religious opinions coincided with his own, to satisfy them that he was not shrinking from the performance of his duty as a clergyman, in declining to act the part of a peace-maker." WILLIAMS, J., said: "I do not mean to say that it would be the duty of the defendant to proclaim the plaintiff's delinquencies in public; but I think he was justified in making them known to persons whom it was his duty to undeceive."

In *Gilpin v. Fowler*, 9 Exch. 615, the plaintiff was master of a school in the parish of which defendant was rector and a manager of the school. The defendant requested him to teach a Sunday school in connection with his school, which the plaintiff declined on account of the increased labor, and was consequently dismissed. The plaintiff being about to set up a school on his own account in the same parish, defendant wrote and distributed in that parish and the adjoining parish a "pastoral letter," denouncing the plaintiff's conduct as unchristian, and warning his parishioners against patronizing his school. *Held*, not privileged. MAULE, J., said: "What, then, was there in the position of the defendant, as rector of the parish, which entitled him to circulate a defamatory letter," etc. "It is difficult to understand how the slightest right to do so can be suggested. As rector he might, no doubt, visit and remonstrate with any of his flock; but when a meritorious individual is about to set up a school, of which he disapproves, because he thinks it may rival the school in which he takes an interest, that he should on that account cast serious imputations on that individual, and still be considered as having published a privileged communication, certainly seems a strange and inconvenient doctrine."

In *Clark v. Molyneux*, 3 Q. B. D. 237, the judge charged the jury as follows:

"Assuming that these occasions were privileged do you think that the defendant made these statements and wrote this letter *bona fide* and in the honest belief that they were true, not merely that he believed them himself — but honestly believed them — which means that he had good ground for believing them to be true? I mean to say that if he pertinaciously and obstinately, perhaps, persuaded himself of a matter for which persuasion he had no reasonable ground, and with respect to which persuasion you twelve gentlemen would say he was perfectly unjustified * * * then your verdict would be for the plaintiff."

Opinions were expressed as follows:

BRAMWELL, L. J. "I am of opinion that this was in itself a misdirection, and that the proper direction to the jury would have been as follows: 'These occasions were privileged, and unless you are satisfied that the defendant availed himself of them to make the statements complained of maliciously' (with an explanation of what is legally comprehended in that word), 'then you ought to find a verdict for the defendant.' By the language which the judge used, he led the jury to the conclusion that the burden of proof is upon the defendant. I also think that the form of the question is objectionable in this, that it may have induced the jury to suppose that they were to find affirmatively either that the alleged libel was written *bona fide*, or that the defendant in publishing it was actuated by feelings of malice; and that if they could not find the former, they must find the latter."

"Before I proceed further in discussing the language of the summing up, I wish to remark that a person may honestly make on a particular occasion a defamatory statement within

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believing it to be true, because the statement may be of such a character, that on that occasion it may be proper to communicate it to a particular person who ought to be informed of it. Can it be said that the person making the statement is liable to an action for slander? In the present case the judge asked the jury whether the defendant did what was complained of in the honest belief that what he wrote and said with reference to the plaintiff was true. At a later period of the summing up the judge explains what he means by honest belief, and the effect of his language is, that the jury must have been led to think that 'honest belief' means, not the actual belief in the defendant's mind, but belief founded upon reasonable grounds. Apart, therefore, from the question upon whom the burden of proof lay, I think there was a misdirection as to the meaning of the term 'honest belief,' and that the verdict against the defendant cannot stand.

"I have some doubt whether the communication to Mr. Green was privileged; that might very much depend on the motive with which it was made; it may be privileged if the defendant made the communication to Mr. Green for the purpose of asking his advice; but if he made it merely for the purpose of unburdening his mind, or merely repeating a conversation, the occasion would not be privileged."

BARR, L. J. "When there has been a writing or a speaking of defamatory matter, and the judge has held — and it is for him to decide the question — that although the matter is defamatory the occasion on which it is either written or spoken is privileged, it is necessary to consider how, although the occasion is privileged, yet the defendant is not permitted to take advantage of the privilege. If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. If the indirect and wrong motive suggested to take the defamatory matter out of the privilege is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious; that he did do a wrong thing for some wrong motive. So if it be proved that out of anger, or for some other wrong motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive. I think I have laid down the correct rule on which to ground the direction to the jury, and I think the learned judge did not follow that rule, but he so expressed himself that the jury would be misled into following other rules. I think the jury were misled into believing that the burden of proof, that the defendant was not actuated by malice in the statements he had made, lay upon the defendant rather than on the plaintiff. I apprehend, the moment the judge rules that the occasion is privileged, the burden of showing that the defendant did not act in respect of the reason of the privilege, but for some other and indirect reason is thrown upon the plaintiff. I am further of opinion that the direction to the jury — that assuming that the occasions were privileged, if they thought that the defendant wrote the letter, and made the statements *bona fide*, and in the honest belief that they were true, not merely that he believed them himself, but honestly believed them, which means he had good grounds for believing them to be true — left the jury to suppose that although the defendant did believe them in fact, yet that did not protect him unless his belief was reasonable, whereas the only question was whether the defendant did, in fact, believe what he said, and not whether a reasonable man would have believed it. The question of willful blindness, or of an obstinate adherence to an opinion, may be tests by which a jury may be led to consider whether the defendant did or did not really believe the statements he made; whereas the learned judge, by the way in which he directed the jury, left them to understand, as I think, that although the defendant did believe the statements, yet if his belief was founded on wrong reasoning, that he was not within the protection of the privilege. In that respect, with great deference, I think the learned judge's direction to the jury was erroneous.

"I am also of opinion that all the occasions were privileged. The only occasion which has been questioned, is the occasion of the defendant's communication with Mr. Green. I am of opinion that where the relation between two persons is so intimate, socially and professionally, as that between a rector or a vicar and his curate, and when it can be said that the vicar is com-

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sulting with his curate either upon the conduct of the curate or of the vicar in ecclesiastical matters, that is an occasion which is privileged. * * * The moment that it was ascertained as a fact that the statement to Mr. Green was made at a consultation between the vicar and his curate, as to the conduct the vicar should adopt in an ecclesiastical matter, the judge was bound to tell the jury that the communication was made on a privileged occasion."

COLTON, L. J. "I think that the learned judge, after ruling that the statements made were privileged, left the case to the jury in a manner which may have misled them as to the true question for their consideration. When once the learned judge had laid down that the occasion was privileged, the only question for the jury to consider was whether the defendant acted from a sense of duty, or was actuated by some improper motive, and the onus of proving that the defendant was influenced by some improper motive, that is, that he acted maliciously, was on the plaintiff. In order to shew that the defendant was acting with malice, it is not enough to shew a want of reasoning power or stupidity, for those things of themselves do not constitute malice; a man may be wanting in reasoning power, or he may be very stupid, still he may be acting *bona fide*, honestly intending to discharge a duty. The question is not whether the defendant has done that which other men, as men of the world, would not have done, or whether the defendant acted in the belief that the statements he made were true, but whether he acted as he did from a desire to discharge his duty.

"With regard to the question as to the statements being privileged, I am of opinion that the learned judge was right in ruling that all the communications were privileged. The only one as to which any doubt could be raised, was the communication made to Mr. Green. Mr. Green is the plaintiff's witness, who says the communication was made to him, the curate, when he was in the vestry, and it was made as communications were often made to him by the defendant, for the purpose of asking his advice. On that evidence the learned judge was right in holding that it was a privileged communication. It was a communication made by the vicar to his curate, with whom he was on the terms stated by Mr. Green, with reference to a matter which seriously affected two parishes in the neighborhood, and which might seriously affect Mr. Green, if by preaching at Mr. Smith's church he was brought into communication with the plaintiff. I am therefore of opinion, the question being for the judge, that his ruling was correct."

In *Todd v. Hawkins*, 2 M. & R. 20; S. C., 8 C. & P. 888, the defendant was the son-in-law of a widow, to whom the plaintiff was paying his addresses, and the libel was a letter sent by the defendant to the widow, charging the plaintiff with misconduct, and warning her against him. This was held privileged, as "the parties were standing in circumstances of confidence and near relationship to each other," and "it is for the common good of all that communications between parties situated as those were, should be free and unrestrained."

An interesting case on this subject is *Botterill v. Whytehead*, Ex. Div. 41 L. T. (N. S.) 588, Dec. 18, 1879. This was an action of libel. The plaintiffs, who were architects, were employed by a committee, in the restoration of Skirlaugh church. The defendant, who was a vicar of a neighboring church, wrote to a member of the committee, concerning the plaintiff, as follows: "I see in the *Hull News* of Saturday that the restoration of Skirlaugh church has fallen into the hands of an architect who is a Wesleyan, and can show no experience in church work. Can you not do something to avert the irreparable loss which must be caused if any of the masonry of this ancient gem of art be ignorantly tampered with?" And to the incumbent of Skirlaugh church he wrote as follows: "I am annoyed to see that you and your committee have engaged Messrs. Botterill as architects for the restoration of your church. Are you aware that they are Wesleyans, and cannot have any religious acquaintance with such work?" The defense was, that the communications were privileged, and that there was no evidence of malice. The plaintiff had a verdict of £50. On the trial, with regard to the question of express malice, the following authorities were cited: *Clark v. Molynaux*, L. R. 8 Q. B. Div. 287; 36 L. T. R. (N. S.) 496; 37 id. 694; *Coxhead v. Richards* 2 C. B. 569; 15 L. J. 278, C. P.; *Woodward v. Lander*, 6 C. & P. 545; *Somerville v. Hawkins*, 10 C. B. 588; 20 L. J. 181, C. P.; *Wright v. Woodgate*, 2 C., M. & R., 573; *Whiteley v. Adams*, 15 C. B. (N. S.) 392; 33 L. J. 89, C. P.; 9 L. T. R. (N. S.) 483. The judgment was affirmed. On the question whether the communications were privileged, the court, KILLY, Ch. B., said: "I am at a loss to see, under the circumstances of the case, what privilege the defendant possessed, he being neither the patron nor the minister of this church, nor a member of the committee appointed to effect its restoration, nor even a parishioner, to interfere between the committee and the plaintiffs in respect of the contract between them." On the question of

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malice, the same judge said: "Now there is no subject in the law involving greater difficulties than this question of express malice. It was argued at the bar, that if a man be informed of something to the prejudice of another, and which is injurious to his character, if true, and if he *bona fide* believe in that information, such his belief negatives express malice. I am clearly of opinion, that if a man should receive information which is injurious, if true, to the character of another, he is not justified in publishing that information to the prejudice of him to whom it relates, merely because he believes it to be true. He may believe it to be true, and will be guilty of malice if he publish it to the world; and he may believe it to be untrue, and yet may be perfectly justified in publishing it to persons with whom he is in communication, and with whom it may be his duty to communicate freely on the subject of the information he has received. These cases of libel contended to be privileged, and where the question of express malice arises, must each be decided upon its own particular circumstances. In the case of *Clark v. Molyneux*, where the defendant had learned that the plaintiff, a clergyman, was about to preach a sermon for another clergyman, a friend of the defendant, and with whom he immediately communicated, it became his duty to state to him the information he had received, before the plaintiff was permitted to preach a sermon; not for the purpose of imputing criminality to the plaintiff, but in order that inquiries might be made, and that the plaintiff might justify himself to the clergyman for whom he was about to preach. The case before the court is entirely different in its circumstances, and the learned judge who tried the cause held, and I think most correctly, that there was evidence of express malice; and that evidence was fairly and fully left to the jury, and the jury found, and I think properly found, that there was express malice; for in this case the defendant had no manner of interest in the question of the employment of the plaintiffs to execute the work in question, which all mankind, or at least every admirer of ancient art throughout England, did not possess equally with himself." STEPHEN, J., said: "If Mr. Whytehead had confined himself to a criticism of the plans or the work the plaintiffs had actually done, I think that then the case would have fallen within the rule allowing a person to criticize fairly, but I think it is going a long step further when you may impute professional incompetency to a person. One way of looking at the matter is this: Either it is a privileged occasion or it is not a libel, in which latter case the question of privileged occasion would not arise. The lord justice left the whole matter to the jury, telling them that this was a privileged occasion, and that the defendant was 'not liable in this action, unless you find that what he said amounts to more than a fair attempt to get done what was right in this matter; unless you think it was more or other than such a fair attempt; or unless you find that if it was a reasonable thing to have been done of itself, it was not done *bona fide*, but was done maliciously.'" "I think it was a question for the jury whether the letter was or was not an excess, and whether there was express malice. I think the learned judge perfectly right in not directing a nonsuit."

The question of privilege came up in *Webb v. East*, English Court of Appeal, Jan. 21, 1880, 41 L. T. [N. S.] 715, on an application to compel the production of letters alleged to contain a libel, which application was resisted on the ground that the letters were privileged. The following extracts are valuable on the definition and character of a privileged communication:

JESSEL, M. R. "In this appeal the question raised is one of very considerable importance, no doubt, as regards the interests of society at large, and especially as regards the interests of that portion of society — a very large one — which consists of masters and servants. The case for the present purpose may be shortly stated in this way: A steward of Sir Gilbert East left his service. He afterwards applied for a similar situation under the Earl of Roselyn. The Earl of Roselyn was willing to engage him, and did engage him in fact, of course, subject to his character proving satisfactory. He wrote to Sir Gilbert East about the man, and received a letter in answer giving the man what Lord Roselyn thought was a bad character, and thereupon he declined his services. The man then brought an action against Sir Gilbert East for libel. Of course, the substance of that action is that the material statements made as to the character of the servant were not only untrue, but were untrue, if I may put it in that way, to the knowledge of Sir Gilbert East, and were stated maliciously, and not with a *bona fide* intention of giving the man a fair character, but with the view to prevent his getting a new service. The plaintiff in the action has neither the letters written by Sir Gilbert East nor copies of them. Lord Roselyn has the original letters; Sir Gilbert East has copies, and the plaintiff wishes to obtain those copies from Sir Gilbert East. Now, it is manifest that the copies in question are material to the

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very issue in the action. The nature of the charges, if charges they were, in the letters, made against the servant, must have a considerable influence upon the decision of that issue as to whether the charges were false; and also as to whether they were false to the knowledge of the defendant, and as to whether from their nature they were instigated by malice. It is impossible not to see, therefore, that these documents are very material. The defendant says that the documents are privileged. Now, the documents are privileged in this sense, they are what are called privileged communications, which I understand to mean this, that *prima facie* (that is, in the absence of evidence to the contrary), they are to be considered as being written *bona fide* and without malice; in other words, that they are an exception to the rule that a man who libels another must justify the truth of the libel. It is for the plaintiff to prove the express malice if I may so call it. But they are not privileged documents, as far as I am aware, in any other sense."

COLTON, L. J. "I think the whole argument upon the point of privilege depends upon the ambiguous meaning of the word privilege. No doubt we are constantly in the habit of saying in actions that the court may refuse production upon the ground that documents are privileged. What does that mean? It means that they are privileged as communications between a party and his legal adviser. These documents are no doubt privileged if the defendant is right that they were *bona fide* letters written in answer to inquiries about a servant, but privileged in what sense? Not privileged from production, but privileged in this sense, that although they may contain defamatory statements the law, under the circumstances, would not impute malice, but to enable the plaintiff in an action for libel upon them to sustain the action for libel he must show, that as a matter of fact, they were written maliciously — that is to say, that they were privileged to this extent, that from the mere fact of containing defamatory statements, the law would not impute malice so as to render proof of express malice unnecessary. But to that extent, and to that extent only, does the word privilege extend."

In *Atwill v. Mackintosh*, 120 Mass. 177, the defendant was employed by the father of the plaintiff's wife to accompany her home on a visit to her parents, and directed to make inquiries concerning the plaintiff's standing. He not only communicated the result of those inquiries to the father, but communicated the same information in a letter to the mother of the plaintiff's wife. *Held*, privileged.

In *Barrows v. Bell*, 7 Gray, 301, a publication, by a member of a medical society, of a true account of its proceedings in the expulsion of another member, and of the result of suits brought by him therefor, speaking of him as "the offender," was held privileged.

In *Gassett v. Gilbert*, 6 Gray, 94, the publication by directors of a corporation, in their annual report, of a caution to the public against trusting one who had formerly been in their employ, but whom they had dismissed, was held justified if made in good faith, and requisite to protect the corporation and the public.

In *Johannes v. Bennett*, 5 Allen, 169, it was held that a letter to a woman, containing libelous matter concerning her suitor, cannot be justified on the ground that the writer was her friend and former pastor, and the letter was written at the request and with the approval of her parents. The plaintiff was the notorious "Count Johannes." The court said: "It seems to us very clear that the defendant in the present case fails to show any facts or circumstances in his own relation to the parties, or in the motives or inducements by which he was led to write the letter," which establish any interest in him. "He certainly had no interest of his own to serve or protect in making a communication concerning the character, occupation and conduct of the plaintiff, containing defamatory or libelous matter. It does not appear that the proposed marriage which the letter written by the defendant was intended to discountenance and prevent, could in any way interfere with or disturb his personal or social relations. The person to whom the letter was addressed was not connected with him by the ties of consanguinity or kindred. It is not shown that he had any peculiar interest in her welfare. Under such circumstances, without indicating the state of facts which might afford a justification for the use of defamatory words, it is plain that the defendant held no such relation toward the parties as to give him any interest in the subject-matter to which his communication concerning the plaintiff related. No doubt he acted from laudable motives in writing it. But these do not of themselves establish a legal justification for holding up the character of a person to contempt and ridicule. Good intentions do not furnish a valid excuse for violating another's rights, or give impunity to those who cast unjust imputations upon private char-

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acter. It is equally clear that the defendant did not write and publish the alleged libelous communications in the exercise of any legal or moral duty. He stood in no such relation toward the parties as to confer on him a right or impose on him an obligation to write a letter containing calumnious statements concerning the plaintiff's character. Whatever may be the rule which would have been applicable under similar circumstances while he retained his relation of religious teacher and pastor toward the person to whom this letter in question was addressed, and toward her parents, he certainly had no duty upon him after that relation had terminated. He then stood in no other attitude toward the parties than as a friend. His duty to render them a service was no greater or more obligatory than was his duty to refrain from uttering and publishing slanderous or libelous statements concerning another. It is obvious that if such communications could be protected merely on the ground that the party making them held friendly relations with those to whom they were written or spoken, a wide door would be left open by which indiscriminate aspersion of private character could escape with impunity. Indeed, it would rarely be difficult for the party to shelter himself from the consequences of uttering or publishing a slander or a libel under a privilege which could readily be made to embrace almost every species of communication. The law does not tolerate any such license of speech or pen. The duty of avoiding the use of defamatory words cannot be set aside except when it is essential to the protection of some substantial private interest, or to the discharge of some other paramount and urgent duty."

See also *Snyder v. Fulton*, 34 Md. 123; *S. C.*, 6 Am. Rep. 314; *Sunderlin v. Bradstreet*, 46 N. Y. 188; *S. C.*, 7 Am. Rep. 322; *Kilnt v. Colby*, 46 N. Y. 437; *S. C.*, 7 Am. Rep. 360; *McBee v. Fulton*, 47 Md. 403; *S. C.*, 23 Am. Rep. 465.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

RATCLIFFE v. ANDERSON.

(21 Gratt. 105.)

Constitutional law — act of legislature authorizing opening of an existing judgment.

An act of the legislature authorizing the opening of an existing judgment is unconstitutional.

PETITION to open a judgment. The opinion states the case. The petition was denied below.

Thomas & Wells, for appellant.

M. D. Ball, for appellee.

CHRISTIAN, J. At the November term of the Circuit Court of Fairfax county in the year 1866, Anderson recovered a judgment by default against Ratcliffe, upon a bond executed by said Ratcliffe and payable on demand, and bearing date the 6th day of June, 1863, for the sum of \$300.

On the 4th day of February, 1874, more than seven years after the judgment was rendered, Ratcliffe filed his petition in said Circuit Court, asking the court to reopen said judgment and scale the amount of the same according to the depreciation of Confederate

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money, he alleging in his petition that the bond upon which the judgment was rendered was given for Confederate currency.

This petition of the appellant was filed under the act of the general assembly, approved March 25th, 1873, amending the act passed March 3d, 1866, which is in the following words :

1. Be it enacted by the general assembly, That the third section of the act passed March 3, 1866, in relation to contracts made between January 1, 1862, and April 10, 1865, be amended and re-enacted so as to read as follows :

§ 3. Where any judgment or decree has been recovered for a specific sum, or for damages, between the said 1st day of January, 1862, and the said 10th day of April, 1865, or shall have been recovered after the said 10th day of April, 1865, and before the 3d day of March, 1870, or if any judgment or decree shall have been rendered or recovered by default since the said 3d day of March, 1866, or shall hereafter be rendered or recovered by default upon a cause of action arising within the period from the 1st day of January, 1862, to the 10th day of April, 1865, and such judgment or decree remain unpaid, it shall be lawful for the courts, in a summary way, on motion, after ten days' notice, either before or after the issue of execution, to fix, settle and direct at what depreciation, or how, the said judgment or decree shall be discharged, having regard to the provisions of this act, to the cause of action for which the judgment or decree was recovered, and any other proof or circumstance, that from the nature of the case, may be admissible.

It is under this provision of the act of March, 1873, that it is proposed to reopen and annul in whole or in part a judgment rendered by a court of competent jurisdiction in favor of the appellee in November, 1866. I am of opinion that this cannot be done, and that the act of assembly above quoted is not only an attempted invasion of judicial authority, but is in contravention of that provision of the Constitution of the United States and of this State which declares that the State shall pass no law "impairing the obligation of a contract."

First, the act is an attempted exercise of judicial power, because it authorizes a court to reopen and review a case which has already passed into judgment. It is now too well settled to admit of serious dispute that the legislative department can no more exercise judicial power than that the judicial department can exercise legislative power. Each is supreme in the exercise of its own proper functions

within the limits of its authority. The boundary line of these powers is plainly defined in every well-ordered government; and in this country it is now a well-established principle of public law that the three great powers of government — the legislative, the executive, and the judicial — should be preserved as distinct from and independent of each other as the nature of society and the imperfections of human institutions will permit. That system which best preserves the independence of each department approaches nearest to the perfection of civil government and the security of civil liberty.

The province of the courts is to decide what the law is or has been, and to determine its application to particular facts in the decision of causes. The province of the legislature is to declare what the law shall be in future; and neither of these departments can lawfully invade the province of the other. This not only results from the nature of our institutions, but it is enjoined by the express provisions of the Constitution, which declares that “the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers belonging to either of the others. See *Griffin’s Executor v. Cunningham*, 20 Gratt. 31, and cases there cited.

I do not deny the power of the legislature to pass statutes in aid of judicial proceedings, and which tend to their support, by precluding parties from taking advantage of errors apparent on the face of the proceedings, which do not affect their substantial rights — such a statute, for instance, as is found in our Code, chapter 177, section 3, which permits a court in which a judgment has been rendered, on notice and motion within five years, to correct any mistake, miscalculation, or misrecital of any name, sum, quantity, or time, when the same is right in any part of the record or proceedings, etc.

Such, also, is the statute which authorizes a court, or judge in vacation, to reverse a judgment by default, or a decree on a bill taken for confessed, for any error for which an appellate court might reverse it.

Statutes such as these are not regarded as an interference with judicial authority, but only in aid of judicial proceedings for the purpose of correcting errors, such as are mentioned in the statute. See Cooley’s Const. Limit. 107; *Griffin v. Cunningham*, *supra*, and cases there cited.

Now, it is to be observed in respect to the judgment under consideration, that it was recovered in a suit brought *after* the passage of the act of March 3, 1866, to wit, at the November term, 1866, of

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the Circuit Court of Fairfax. Under the act referred to it would *then* have been competent for Ratcliffe to show that the contract between him and Anderson was "according to the true understanding and agreement of the parties, to be fulfilled or performed in Confederate States treasury notes, or was entered into with reference to such notes as a standard of value;" and upon such evidence the court then had authority to reduce the debt from its nominal amount according to the scale of depreciation. But no such defense was then made, and no evidence supporting such defense was offered; and a judgment was properly rendered for the whole amount of the bond. That judgment, not appealed from, was final, and adjudicated the rights of the parties forever, unless the judgment can be reopened under the act of March 25, 1873. The proceeding under which it is now attempted to reopen this judgment was not had under the act of March, 1866, nor could it be; and it is not so claimed on the petition for a writ of error. The third section of that act plainly refers to judgments rendered before its passage, and not to judgments thereafter recovered. The language of that act plainly shows this; and the fact that the act of 1873 was passed for the purpose of extending the provisions of the act of 1866, plainly indicates that this was the legislative construction given to that act. The petition for a writ of error concedes this by admitting that the proceedings in this case were had under and by virtue of the act of March 25, 1873. It is to the construction and constitutionality of *that act*, and not the act of March 3, 1866, that my opinion is confined. The single question, therefore, we have to determine is whether this last-named act is constitutional. My opinion clearly is that upon the principles already adverted to, and for other reasons to be assigned, said act, so far as it authorizes the reopening of a judgment rendered after March 3, 1866, is in contravention of the Constitution, and therefore void.

When the act under which the claim in this case is asserted was passed, the defendant in error (Anderson) had recovered a judgment against Ratcliffe. That judgment was a final adjudication of the rights of the parties, and had so stood for nearly seven years before the passage of the act. The rights of Anderson and those claiming under him had become fixed and vested; and any attempt on the part of the legislature to impair these vested rights was an invasion of judicial authority, and must be treated as unconstitutional and void.

As was well said by Chief Justice MELLAN, in *Lewis v. Webb*, 3 Greenl. 326, 332, whose language, with slight modifications, we may adopt in this case: "Can the legislature, by a mere resolve, set aside a judgment or decree of a judicial court and render it null and void, or authorize such court to reopen a judgment already final and annul the same in whole or in part? This is an exercise of power common in courts of law *a priori*, not questioned in a proper case, but it is one purely judicial in its nature and consequences." Such an act "professes to grant to one party in a cause which has been, according to existing laws, finally decided, special authority to compel the other party, contrary to the general law of the land, to submit his cause to another court for trial; the consequence of which may be the total (or partial) loss of all those rights, or all that property which the judgment complained of had entitled him, and those claiming under him, to hold and enjoy; that is, it accomplishes that which the existing law forbids, and which by direct and legal course cannot be attained. * * * It is the province of the legislature to make and establish laws; it is the province and duty of judges to expound and apply them."

In the case before us the legislature interfered to provide a new remedy for the benefit of a class of persons to obtain a rehearing in suits in which judgments and decrees had been made, and became final against them. At the time the act under review was passed the money adjudged to be paid to the defendant in error was his property in a legal sense, and of this he could not be deprived, and his vested right therein could not be impaired by subsequent legislation. See *Burch v. Newbury*, 10 N. Y. 396; *Ely v. Halton*, 15 id. 300; *Wood v. Oakely*, 11 Pa. 400; *Denny v. Mattoon*, 2 Allen, 361; *Van Rensselaer v. Smith*, 27 Barb. 154; *Dash v. Van Kleeck*, 7 Johns. 490. In the last-named case SPENCER, J., said:

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vested; and that every such attempt of legislative action is plainly an invasion of judicial power, and therefore unconstitutional and void.

But there is another ground upon which, I think, under the settled law and decisions of this court, the act of March 25, 1873, must be held to be unconstitutional and void. I think it is plain that the act in question is in contravention of that provision of both the Federal and State Constitution which declares void all laws "which impair the obligation of a contract."

The judgment recovered by Anderson against Ratcliffe, and which was recovered seven years before the passage of the act authorizing a reopening of that judgment and rehearing of that case, already passed to final judgment, was certainly a contract, and one of the highest nature.

Blackstone in his Commentaries divides contracts of debt into three classes — debts of *record*, debts by *special* and debts by *simple* contract. "A debt of record (he says) is a sum of money which appears to be due by the evidence of a court of record. Thus, where any specific sum is adjudged to be due from the defendant to the plaintiff in an action or suit at law, this is a *contract of the highest nature*, being established by the sentence of a court of judicature. 1 Chitty's Bl. Com., book 2 (marg.) 455. See also opinion of SPENCER, J., *Dash v. Van Kleeck*, 7 Johns. 489, 490.

The judgment recovered by Anderson against Ratcliffe was a contract of the highest nature, and any legislature which authorizes a court to reopen that judgment and reduce it in amount necessarily impairs its obligation.

This court held in *Roberts' Administrator v. Cocke*, and *Murphy v. Gaskins' Administrator*, the act of the legislature found in chapter 173, section 14, Code 1873, page 1120, which empowers courts or juries in all suits for the recovery of money founded on contracts, express or implied, where the original consideration accrued prior to the 10th day of April, 1865, to remit the interest found to be due, or any part thereof, for the period between the 17th of April, 1861, and 10th April, 1865; and which also empowers the court in which any judgment or decree has been rendered prior to the passage of the act, on motion to review such judgment or decree, and abate the same to the extent of the interest aforesaid, to be unconstitutional and void. This act was declared to be in contravention of the Constitution because it impaired the obligation of a contract and inter-

ferred with vested rights. It is sufficient on this branch of the case to refer to the able and elaborate opinion of Judge BRANKS in these cases, and the authorities cited by him. It is enough to say, upon the authority of these recent cases, that if an abatement of a part of the interest for which the judgment is rendered is declared to

bearing interest from the 1st of May, 1859 — which bond executed by the said Bramham to the said Michie for the money of the said lands. Both deeds are witnessed by Quarles, James M. Vest and William J. Johnston.

On the first of October of the same year George H. Bramham wife conveyed the same lands, by deed of that date, to said M. Vest for the consideration of \$7,500, the receipt whereof acknowledged by the deed. The deed from Michie to Bramham and the deed from Bramham to Vest, are both admitted to record the same day, January 16, 1860, the former being proved by the subscribing witnesses, William J. Johnston and James M. Vest. The deed of trust has never been recorded. But some time before it was executed and before Bramham sold to Vest, Michie removed to Missouri and carried it with him, but left the second and third bonds here in the hands of his attorney. The first bond has been paid — and probably before he left — and the second bond admitted by the bill, up to the 22d of February, 1861, had been paid with the exception of \$135 or \$140, due as of that date. The third and last bond is wholly unpaid. And this bill was brought to enforce the deed of trust and subject the lands to sale to satisfy the debt due. The bill alleges that although the deed of trust was registered, the subsequent purchaser had notice of its existence when he purchased from Bramham and paid him the purchase-money, and that the lands in his hands are chargeable with the debt secured by said deed of trust; and he relies upon the fact of his having witnessed the deed, under the circumstances, as evidence that he had notice.

Whilst it is held that the fact of notice may be inferred from the circumstances as well as proved by direct evidence, the proof must be such as to affect the conscience of the purchaser, and must be as strong and clear as to fix upon him the imputation of *malice*. See *Mundy v. Vawter*, 3 Gratt. 494, 545; *Siter v. McClanahan*, 280, 313; *Dey v. Dunham*, 2 Johns. Ch. 182. Professor M. in his admirable work, says the effect of the notice, which will attach to a subsequent purchaser for valuable consideration, and exclude him from the protection of the registry law, is to attach to the subsequent purchaser the guilt of fraud. It is therefore never to be presumed, but must be proved, and proved clearly. A mere suspicion of notice, even though it be a strong suspicion, will not suffice. *Min. Inst.* 887, 2 ed., and cases cited.

The proof relied on in this case is that the appellant was a subscribing witness to the deed of trust, under circumstances, which, it is contended, show that he was apprised of the existence and contents of the deed of trust. Sugden says the better opinion is, that being a witness to the execution of a deed will not of itself be notice ; for a witness in practice is not witness to the contents of the deed. 2 Sugd. Vend., bottom of page 1060, top 563. In *Welford v. Beezley*, 1 Ves., Sr. 7, Lord Chancellor ELDON said : " I do not think the bare attesting a deed as a witness will create such a presumption of his knowledge of the contents as to affect him with any fraud therein ; for a witness is only to authenticate it, and not to be presumed privy to the contents." Lord KENYON held, in *Harding v. Crethorn*, 1 Esp. N. P. C. 56, that the mere subscribing an instrument as a witness should not bind the party unless there was some evidence that he was acquainted with its contents at the time.

The only case I have found which holds a different doctrine is *Mocatta v. Murgatroyd*, reported in 1 P. Wms. 393; and the editor remarks that it has generally been disapproved of, and cites authorities to that effect. In *Beckett v. Cordley*, 1 Brown C. C. 353, the lord chancellor, referring to it, says: " I do not view this as a case that I would determine in the same manner; for," he remarks, " a witness in practice is not privy to the contents of the deed." If it were proved that all the witnesses were present together when they severally subscribed their names as attesting witnesses; or that the parties talked over the subject-matter of the deeds in the presence of Mr. Vest; or that the deeds were written in his presence, and instructions given to the draughtsman in his presence and hearing; or that the blanks were filled up by one of the subscribing witnesses in his presence, and he heard instructions given to Mr. Quarles, whose name he should insert as trustee, or was present when the instruction was given; it might be inferred therefrom that he was apprised of the character of the instrument he was called on to witness. But there is no such proof. It does not appear that the witnesses were together when they signed. It does not appear that the deeds were written in the presence of Mr. Vest. The presumption is rather to the contrary; that they were not written at the time they were executed, but had been written before, and blanks left to be filled when the parties met to execute them ; nor does it appear that Mr. Vest was present when Mr. Quarles was requested to fill the blanks, and when he filled them up. All we can say is that he may have

been present, and that the witnesses may have been together when they signed; but it is only conjecture. It may have been so, or it may not have been. There is no proof as to the place or the circumstances under which the deeds were executed and attested; whether it was at a public or private place; whether it was on a public or private occasion; whether the witnesses were convened at the place for the purpose; or whether they accidentally dropped in and were requested to witness the papers; whether Mr. Quarles had first shown the blanks and witnessed both papers before the other two witnesses came in — his name is first subscribed to both papers, while Johnston's is subscribed before Vest's to one, and after Vest's to the other, as if both papers had been attested by Quarles, and Vest and Johnston were then called in, and one of them was handed the paper with a request that he would witness it, which he did, and then gave place to Johnston, and he subscribed his name, and before he subscribed the other paper was handed to him to witness, which he did, and then gave place to Vest, who witnessed it also, or *vice versa*, or all might have been done in two or three minutes of time, without a question being asked. The parties requesting their attestation, acknowledging it to be their act and deed as they handed the papers to them, respectively, for their attestation, and having performed what they were requested to do, the said Vest, or both of them, might have immediately left the room without a word being said as to the character of the instruments they had attested. It is not probable that there is any proof that it did so occur. But it might have occurred, and there is no proof that it did not; and it is not incompatible with the office of the witness, which, as Lord ELDON said, is only to authenticate the instrument, and is not presuming to be privy to its contents. And it is not unusual in practice, for KENYON said, a witness in practice is not privy to the contents of a deed.

[Omitting the question of actual notice.]

I am of opinion, therefore, to reverse the decree of the Court, and to dismiss the bill as to Vest, with costs.

Decree reversed.

NOBLE v. CITY OF RICHMOND.

(31 Gratt. 371.)

Municipal corporation — liability for injury by defective street.

A municipal corporation, empowered to lay out and keep streets in repair, is liable in damages to an individual who sustains injury by the defective con-

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it there is no other who has the power to do it, and so it will be done at all. The terms of the grant therefore imply a *duty* on the part of the defendant to keep the streets and sidewalks of the city in good order and safe condition. And so, "where the duty is not specifically enjoined, and an action for damages, on account of defective streets, is not expressly given," it is said, 2 Dill. on Corp. § 789, "still both the duty and the liability, if there be in the charter or legislation of the State to negative the duty, it has often, and in our judgment properly, been deduced from powers conferred upon the corporation to open, grade, improve, and conclusively control public streets within their limits, and the means, which, by taxation and local assessments, or both, it places at its disposal to enable it to discharge this duty."

The means to perform the duty of maintaining the streets in good condition by authority to levy taxes, or impose local assessments, are conferred upon the defendant by its charter. If this view is correct, it is undoubtedly a duty devolving upon the corporation of the Richmond city — the defendant — to keep its streets and sidewalks in repair and in safe condition. If it neglects to keep any of its streets in repair and in safe condition, by reason whereof private persons without fault on their part have sustained injuries, is the city liable to a civil action for damages?

The books distinguish between municipal corporations proper and *quasi* corporations, such as counties and townships, and New towns. It is almost universally considered that the latter are not liable to civil action for damages occasioned by defective roads or bridges under their control, unless so declared by statute. If there be no *common-law obligation* upon them, it is held, to repair roads or bridges within their limits, and they are only obliged to do so by force of the statute. Even when the legislature enjoins on a corporation the duty to make and repair roads, etc., and grants the power to levy taxes therefor, it has generally been regarded as a public and corporate duty, and these political subdivisions of the State, when the duty is imposed, as State agencies, are not liable to a civil action for damages caused by the neglect to perform the duty, unless a civil action is expressly given by statute. But in a recent case, *v. Inh. of Randolph*, 14 Gray, 541, Mr. Justice Mercaut says: "This rule of law, however, is of limited application. It is only in the case of towns, only to the neglect or omission of a town to perform those duties which are imposed on *all* towns, with

corporate assent, and exclusively for public purposes; and not to neglect of those obligations which a town incurs when a special duty is imposed on it, with its consent, express or implied, or a special authority is conferred on it at its request. In the latter cases a town is subject to the same liabilities for the neglect of those special duties to which private corporations would be if the same duties were imposed, or the same authority conferred on them, including their liability for the wrongful neglect as well as the *wrongful acts of their officers and agents.*" And this comports with the reason which has been assigned for the distinction between these *quasi* corporations

to private corporations aggregate, and it obliges such corporations to respond in a private action, though the action be not given in rem, for the damages which another has sustained by reason of neglect or default to perform any corporate duty. *Riddle v. Proprietors of Locks and Canals, etc.*, 7 Mass. 169; *Weld v. Proprietors, etc.*, 6 Greenl. 93; *Ward v. New York, etc., Turnpike Co., etc.*, 323, 325; *Parnaby v. Canal Co.*, 11 Ad. & El. 223, C. L. R. 54.

The principle which lies at the basis of the decision in *H. Mayor, etc., of Lyme Regis*, 5 Bing. 91; 3 B. & Ad. 77, as stated by Mr. Justice SELDEN, in *Weet v. Trustees of the Village of Port Jervis*, 16 N. Y. 163, in note, and of the series of English cases which bear the authority of which that case was decided, is, "That when a corporation, whether an individual, or a corporation for a consideration received from the sovereign power, has become bound by covenant or agreement, express or implied, to do certain things, such corporation or individual is liable, in case of neglect to perform such covenant, not to a prosecution by indictment, but to a private action at the suit of the person injured by such neglect. In all such cases the contract made with the sovereign power is deemed to enure to the benefit of the individual interested in its performance." In *Sawyer v. City of Lowell*, 230, GRATT. 230, JOYNES, J., speaking for the whole court, announced the same principle; i. e., "that where the authority, though exercised for the accomplishment of objects of a public nature, and for the benefit of the public, is one from the exercise of which the corporation derives a profit; or where the duty, though of a public nature and for the public benefit, may fairly be presumed to have been enjoined upon the corporation in consideration of privileges granted to and enjoyed by it, the exemption does not apply;" and the reason he gave for holding that why the corporation is not exempt from liability in a civil action, though differently expressed, is substantially the same, that the corporation is not acting merely as an agent of the public, but with a view solely to the public benefit, but that in the former case (where it derives a profit), it is pursuing its own interest and in the latter is executing a contract, for which it has received consideration. This court also, in *City of Richmond v. Board of Commissioners and Administrators*, recognized the doctrine that where a municipality acts in the exercise of powers or the discharge of duties of a non-discretionary or governmental, but purely ministerial character, it incurs, like a private person, the common-law

for the acts of its servants ; and it does not matter, as was once intimated, if there be the absence of special rewards or advantages, it being considered and allowed that such gratuitous function is to be regarded as a burden accepted under the charter in consideration of its privileges."

The case of *Henly v. Mayor and Burgesses of Lyme Regis, supra*, went from the Common Pleas, through the King's Bench, to the House of Lords. And the counsel for the plaintiff in the House of Lords contended that every breach of a public duty, or neglect of what the party is bound to perform, working wrong or loss to another, is injurious and actionable, a principle hereinbefore alluded to, and cited *Sutton v. Johnstone*, 1 T. R. 784, and *Russell v. Men of Devon*, 2 id. 667. But it appears that the decision was not upon that ground, from the opinion of PARK, J., the only opinion given in the House of Lords, who, after quoting the charter, said : "Now these words are undoubtedly an expression of the King's will, that the corporation shall repair, but they are not the less a consideration on that account ; on the contrary, they show the consideration for the grant, the motives inducing the King to make the grant, and consequently the terms and conditions on which the grant was to be accepted."

Mr. Justice SELDEN, in *West v. Brockport, supra*, very truly remarks "that such charters are never imposed upon municipal bodies except at their urgent request. While they may be governmental measures in theory, they are in fact regarded as privileges of great value, and the franchises they confer are usually sought for with much earnestness before granted. The surrender by the government to the municipality of a portion of its sovereign power, if accepted by the latter, may with propriety be considered as affording ample consideration for an implied undertaking on the part of the corporation to perform with fidelity the duties which the charter imposes."

Mr. Justice COOLEY in a dissenting opinion, in *Detroit v. Blakeby*, 21 Mich. 84 ; S. C., 4 Am. Rep. 450, says : "The New York courts have invariably held that when the people of the municipality accepted the charter which they thus solicited, a contract was implied on their part to perform the corporate duties. They have always denied that in this respect there was any difference between a municipal corporation and a private corporation or private individual who had received from the sovereignty a valuable grant charged with conditions ;" and he cites numerous decisions of the New York

courts, which fully sustain the assertion. He cites, also, decisions of other States—of North Carolina, Pennsylvania, Alabama, Connecticut, Illinois, Maryland, and Wisconsin, two decisions of this court before referred to. He also cites decisions of the Supreme Court of the United States. These and others which might be cited, though all of them may not go to the full extent of his proposition, I think fully maintain the proposition that municipal corporations are liable in civil action for neglect of duties, in cases like the present, to a private citizen who is injured by such neglect. The doctrine of *Henley v. Mayor of Lyme Regis*, as applied in *West v. Brockport*, Mr. Justice Hunt says, is denied in no State except in New Jersey, and in the authorities to which he referred seem to have been passed in silence, and perhaps were not observed.

In the recent case of *Barnes v. District of Columbia*, 1 U. S. 103, the Supreme Court of the United States maintained the liability of municipal corporations to a civil action for injuries to a private individual caused by their neglect to keep the streets or sidewalks in repair. Mr. Justice HUNT, in delivering the opinion, in which a majority of the court concurred, says that the decisions holding the doctrine "that a city is responsible for its mere negligence" are numerous and so well considered that the law must be deemed settled in accordance with them, and cites many of them, including the two Virginia cases cited *supra*. *Detroit v. Blakeby*, referred to and disapproved of, whilst the conclusions of Mr. COOLEY in his dissenting opinion are maintained.

But no one can maintain an action against the city grounded on the defect or want of repair of the street or sidewalk, but must allege and prove that the corporation had notice of the want of repair—which notice may be implied—and that the plaintiff was injured, either in person or property, in consequence of the defective and inconvenient state of the street or sidewalk. *Weightman v. Corporation of Washington*, 1 Black, 39. In this case the defect in the sidewalk, and the injury caused thereby to the plaintiff, and that the corporation had notice of it, are all averred in the declaration, and must be taken to be true on the demurrer.

For the reasons stated, and upon the authorities cited, we are of opinion that the plaintiffs, upon the case made by their declaration, were entitled to their action against the defendant for damages, and that the court erred in giving judgment for the defendant.

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therefore of opinion to reverse the judgment, with costs, and to remand the cause to be proceeded with in conformity with the principles herein declared.

MONCURE, P., dissented.

Judgment reversed.

 WOODY V. OLD DOMINION INSURANCE CO.

(31 Gratt. 302.)

Insurance — oral agreement for — payment of premium — representation of title

An oral agreement for insurance will be enforced in equity.*

An agreement for insurance having been made by the applicant and the agent of the insurer, authorized to fill up and deliver policies, the former tendered the premium to the latter, but the latter, residing in the house insured and owing the former for rent, said he would apply the premium toward the rent. The company was at the time indebted to the agent in about three-quarters the amount of the premium. *Held*, a valid payment of the premium.

A condition in an insurance policy, that any interest in the property insured, not absolute, or less than a perfect title, must be represented and expressed in the policy, is not broken by the existence of a lien for purchase-money reserved in the deed of the premises.†

SUIT in equity for amount of a fire insurance. The opinion states the case. The bill was dismissed.

John B. Young and C. White, for appellant.

Wm. W. Crump and Bev. T. Crump, for appellee.

BURKS, J. This is an appeal from a decree of the Chancery Court of the city of Richmond, dismissing the bill of the complainant James P. Woody, who is the appellant here.

The bill states in substance, that on the 16th day of April, 1875, the defendant contracted with the complainant to insure his building in the town of Tappahannock, in Essex county, Virginia, against loss or damage by fire, to the amount of \$1,000, the risk to commence on the said sixteenth day of April, and continue one year; that the consideration for the insurance was a premium of twelve

* To same effect, *Putnam v. Home Ins. Co.* (123 Mass. 324), 25 Am. Rep. 93.

† To same effect, *Quarrier v. Peabody Ins. Co.* (10 W. Va. 507), 27 Am. Rep. 592.

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dollars and fifty cents, which was paid; that in consideration so paid, the defendant agreed to issue to him, on the tenth day of April, a policy such as was usually issued insured by the defendant; that the defendant neglected and refused to issue said policy on that day, and has ever since refused so to do, although the premium has been paid as that on the following day (the seventeenth of April) the policy was destroyed by fire, and the complainant's loss exceeds the amount of the insurance; that the complainant has complied with the terms and conditions of his contract, and has done everything necessary to entitle him to recover the amount assured, and yet the defendant has refused and still refuses either to issue and deliver to him the said policy or to pay the amount assured; and the bill is for a specific performance of the contract of insurance, that the defendant may be decreed to issue and deliver the policy to the complainant, and for general relief.

There was a demurrer to the bill which the chancellor overruled. The statements of the bill, if proved, make out an equitable relief. *Tayloe v. Merchants' Fire Ins. Co.* 9 D. C. 1; *Com. Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 10 D. C. 1; *Post v. Aetna Ins. Co.*, 43 Barb. 351; Ang. on Fire and Marine Ins., § 34; Wood on Fire Ins., § 12, and authorities cited in note.

In the case cited *supra*, from 9 Howard, the contract of insurance was completed in all respects, except the issuing and delivering of the policy. The loss occurred, and then the insurance company proceeded further with the contract. The bill was filed for a specific performance of the contract, but the prayer was for a decree for loss and for general relief.

The law is correctly expounded, I think, in the opinion delivered by Mr. Justice NELSON, who, in answer to the objection that the plaintiff had an adequate remedy at law, proceeds that "had the suit been instituted before the loss occurred, it would have been, in a court of equity, to enforce specific performance, and to compel the company to issue the policy. And the remedy is as appropriate before the loss, if not as essential, in order to facilitate proceedings at law, but the proceedings would have been more complicated and embarrassing than upon the policy. The plaintiff had a right to resort to a court of equity to compel the defendant to issue the policy, either before or after the happening of the loss."

being properly in that court after the loss happened, it is according to the established course of proceeding, in order to avoid delay and expense to the parties, to proceed and give such final relief as the circumstances of the case demand. * * * As the only real question in the case is the one which a court of equity must necessarily have to decide, in the exercise of its peculiar jurisdiction in enforcing a specific execution of the agreement, it would be an idle technicality for that court to turn the party over to his remedy at law upon the policy. And no doubt, it was a strong sense of this injustice that led the court at an early day to establish the rule, that having properly acquired jurisdiction over the subject for a necessary purpose, it was the duty of the court to proceed and do final and complete justice between the parties, where it could as well be done in that court as in the proceedings at law."

The result of the decision was that the complainant was entitled to a decree for his loss, and the case was remanded for such further proceedings as might be necessary to carry the opinion of the court into effect.

The answer of the company, as defendant in the court below, puts the burden of proof on the complainant. It denies all the material allegations of the bill — denies that there was any contract of insurance or payment of premium, as stated in the bill, or that anything has been done by the complainant to entitle him to recover of the defendant the amount of insurance stated in the bill. It admits that the defendant has heard that the complainant professes to have made the contract, under which he seeks to recover, with an agent of the defendant doing business for it at a distant place from its home office, and if such was the case, calls for strict proof of the terms and provisions of the contract, and of such compliance of the complainant therewith as was necessary on his part to entitle him to the relief prayed for in the bill.

The policy which the appellant claims to be entitled to under his alleged contract, and under which he claims indemnity for the loss sustained, contains the following stipulation or condition: "This company shall not be liable, by virtue of this policy or any renewal thereof, till the actual payment of the premium to the company or its authorized agent;" and it is contended by the appellee's counsel

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nock was the duly constituted agent of the defendant company to take risks, collect premiums and issue policies, and was supplied with policies regularly executed by the officers of the company, which he was empowered to fill up and deliver to persons desiring to be insured, without any occasion to communicate with the company before said policies were issued and delivered.

The appellant resided in Fredericksburg, and owned the building in Tappahannock, which was occupied by Rowzie, who was his brother-in-law, under a contract to pay rent. The appellant, who was a seafaring man, came on the thirteenth day of April, to Tappahannock, where his vessel lay, preparatory to a voyage he was about to make to Baltimore. It seems that the building at Tappahannock had been insured in some company, which had an agency at Fredericksburg, but the policy had just expired, and before leaving Fredericksburg the appellant had directed his wife to have the policy renewed. On arriving at Tappahannock, ascertaining that Rowzie was the agent of the Old Dominion Insurance Company (the appellee) to effect insurances, the appellant concluded to have the building insured in that company. The value of the building and amount of premium being agreed upon, it was further agreed, at the suggestion of Rowzie, that he should write to appellant's wife at Fredericksburg and ascertain from her whether she had taken out any policy at that place, as directed by her husband, and if she had not done so, Rowzie, as soon as he was so informed by her, was immediately to issue a policy on behalf of the appellee and forward it to appellant's wife at Fredericksburg. The terms of the contract being mutually assented to, the appellant thereupon tendered to Rowzie twelve dollars and fifty cents, the full amount of the premium, but Rowzie declined to take it, saying, "I have in my hands money belonging to you for rent, and will credit you by that amount." There is no doubt as to the actual tender. Rowzie says, "he (Woody) pulled out his pocket-book and took out the money to pay me." Moreover, the company was then indebted to Rowzie, as he says, to the amount of nine dollars advanced for it by him some time previous. This contract was made, as before stated, on the thirteenth day of April. The appellant then left with his vessel for Baltimore. Rowzie, pursuant to the agreement, wrote to appellant's wife, and on the sixteenth day of April received from her a letter in reply, informing him that she had not effected any insurance in Fredericksburg. As soon as this letter was received by Rowzie it became his

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duty *eo instanti* to issue and forward the policy to appellant's wife, as he had agreed to do. He did not do so, however, and assigns as a reason for his neglect, that he was busy that day about other matters, and did not think it actually necessary to send the policy by that night's mail. In the early morning of the next day (the 17th) the building was entirely destroyed by fire. No policy was ever issued to the appellant by Rowzie or by the company, nor was the premium ever paid by the appellant unless the tender aforesaid, coupled with the agreement between the appellant and the company's agent (Rowzie), amounted to a payment.

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were tendered to him, he is clear in his recollection that he at that time owed the appellant that amount for rent past due. He then paid over that amount to the appellant in discharge of the rent due, and the appellant had immediately handed it back to him for the premium, nobody will doubt that the premium would have been actually paid. Did not the transaction, which took place, amount substantially to the same thing? The appellant took the money from his pocket and offered it to Rowzie, who declined to take it, saying, in terms, "*I have in my hands money belonging to the rent, and will credit you by that amount.*" It seems to me that it would be extremely technical to hold that this was not a payment when if instead of retaining the money, which he says he had in his hands belonging to the appellant, he had paid it over to him in full, and taken it back from him with the other, all will admit that there would have been payment. In the latter case, the money would have become at once the money of the company in the hands of its agent, and so, I think, the money retained by the agent under the arrangement made, became in like manner the money of the company, the greater part of which, in fact (nine dollars) was in the hands of the company; for according to Rowzie's statement (and it is not contradicted), the company owed him that balance on account.

In the case of *Hallock v. Commercial Insurance Co.*, 2 Gratt. 268, one of the conditions of the policy was the same as in the present case — that the insurance should not be binding until payment of premium. The agent in that case was authorized to make proposals, receive proposals for insurance, and receive premiums on policies accepted by the company, but was not authorized to make advances or issue policies. The proposals for insurance were, under the regulations prescribed, sent by him to the company at its office, and if accepted by it, the policies were to be sent to him for delivery. It will be observed that the powers of this agent were not so large as those of the agent in the present case.

The agent, when applied to by the plaintiff for insurance, made the survey, and told the plaintiff what the premium would be. The plaintiff thereupon offered him the premium, when he said he would consider it as paid, but would leave it (as he did) with the plaintiff, who was a banker, and with whom he kept his account, until the policy arrived, when he would call and get the money. The policy was sent by the agent to the company, the risk was ac-

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to commence from a previous day, and the policy signed was forwarded by mail to the agent; but it turned out that the building insured was destroyed by fire on the very day the policy was signed, and two hours before it was so signed. The company being ignorant

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would meet with approbation in most of the States. May
ance, § 348. See, also, Wood on Fire Insurance, § 28, p. 69

An examination of the case of *Hoffman v. John Hancock Life Ins. Co.*, 92 U. S. 161, also cited, will show that the agent, without authority of the company, had agreed with the insured to accept *personal property* — a horse — in part payment of premium, and upon the facts as proved it was decided that the transaction was a fraud upon the company.

The case cited from 68 N. C. 11, *Ferebee v. N. C. Mutual Life Ins. Co.*, seems to be more directly in point. There the agent, indebted to the insured, and although there was conflict in testimony as to the alleged agreement that the agent should, in discharge of this indebtedness, pay the premium to the company, yet the court treated the case as if the agreement was proved, and held that it did not bind the company, because never authorized nor ratified.

This North Carolina case is the only authority cited by the counsel for the appellee which seems to directly support the doctrine for which he contends, to wit: that the agent of an insurance company, having authority to receive premiums, cannot so bind himself for the insured as debtor to the company he represents for the amount of the premium, which by the terms of the policy is required to be paid before the policy takes effect. The doctrine, I think, is deducible from cases already cited in this opinion. I shall refer to only two additional cases.

In *Bouton v. American Mut. Life Ins. Co.*, 25 Conn. 54, the court decided that an agreement made in good faith between an insured and an agent having authority to receive an insurance premium, that the agent shall become personally responsible to the insured principals for the amount of such premium and the insured shall be a personal debtor therefor, constitutes a payment of the premium between the insured and the insurance company. The same doctrine was affirmed in *Sheldon v. Conn. Mut. Life Ins. Co.*, 25 Conn. 207.

In these Connecticut cases, the policies, as in the case in judgment, contained a stipulation to the effect that they were not to be in force on the company until the amount of the premium, as stated in the policy, was paid to the company or its accredited agent.

In the last-named case, one Norton was the general agent of the company for the purpose of procuring applications, delivering policies and receiving premiums. His powers were not so exten-

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in the case now to be decided. It seems he had no authority to issue policies; he could only receive proposals and forward them to his principal for acceptance, and when a proposal was accepted and policy signed by the proper officer of the company, the policy was returned to the agent for delivery. In the present case, the agent was supplied with policies duly executed by the officers of the company, and he had authority, in effect, to make the contract of insurance, fill up the policies, and then deliver them.

There was evidence to prove that Norton, the agent of the defendants, solicited Curtiss (the plaintiff's intestate) to become insured in their office; that Curtiss declined being then insured and wished delay, because he had not money on hand to pay the premium, as the terms of the policy required; that finally Norton agreed that he would provide for the premium himself, and it should be considered and held to be paid to the company, and the note for the balance be given afterwards, and that the contract should be held to be good when the proposals were accepted in Hartford, and the policy should be made out at a future time bearing date from that day. "It would seem as if this arrangement," says ELLSWORTH, J., delivering the opinion of the court, "if made out by the proof to the satisfaction of the jury, was material to the plaintiff's case, and would establish the validity of his claim to a proper policy of insurance. This arrangement is one of daily occurrence, where parties agree for an immediate insurance, but time is given for the payment of the premium and the execution and delivery of the policy of insurance, the thing to be done is agreed to be considered as done, so that the obligation to pay the premium is the payment, and the obligation to make out the policy is virtually the policy itself."

The appellant's case is even stronger than these Connecticut cases. In these last the premium was considered and treated as paid, although there was no actual payment, and no means of the applicant in the hands of the agent to be applied to the payment. There was a mere agreement that the agent should provide payment for the applicant. In this case there was an actual tender of payment and an appropriation of the means of the applicant in the agent's hands to the payment, and about three-fourths of the premium were already in the hands of the company.

Good faith, of course, is essential to the validity of such a transaction, and I see nothing in the record inducing the belief that it was not exercised by the appellant in this case, and I am of opinion that

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he has complied with the before-recited condition of the policy he contracted for.

The policy contains this further provision: "Any interest insured, not absolute, or that is less than a perfect title building is insured that is on leased ground, the same must be fully represented to the company and expressed in this writing, otherwise the insurance shall be void."

It appears that at the time the appellant contracted for insurance of the building he had the fee simple estate conveyed in which a lien was reserved for the payment of purchase money about \$300 or \$350 of which remained unpaid. It seems the existence of this lien was not known to the agent, Rowzi, who mentioned it by the appellant; and it is contended by the counsel that the failure of the appellant to disclose it vitiates the policy.

The first part of this condition, "any interest in property not absolute," has been judicially construed in other cases relating to the character or *quality* of the estate. The term "interest in such a condition," has been held to be synonymous with "interest" used in contradistinction to *contingent* or *conditional*.

City Fire Ins. Co., 29 Conn. 10. And so, as it seems to me, the words, "or (interest) less than a perfect title," in the condition which they are used, should be construed as referring to the extent of the interest or estate, which is measured by its duration. The word "less" is a term denoting quantity; an estate or interest less than a perfect title may therefore mean one that is limited in extent and duration — as an estate for life, for years, or "less" than an estate in fee simple, or than one of unlimited duration. If this be not the true construction, I am still of opinion that the proper construction can these words be taken to have been intended to guard against mere incumbrances. If such had been the intention, language more appropriate for the purpose would have been employed, as we find in policies where disclosure of incumbrances is required. In such the requirement is generally plainly expressed. The mere failure, therefore, of the appellant to make known the existence of the lien which appeared on the face of the policy not requiring such disclosure, and no inquiries being made, did not vitiate the insurance, there being no fraudulent intent, and no such intent is to be inferred from the evidence. *Westham Mut. Fire Ins. Co. v. Sheets*, 26 Gratt. 854.

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The fact is, the property is proved to have been worth probably \$1,900. The amount of insurance was \$1,000, and the lien, at the outside, for not more than \$350. So that the risk was not seriously, if at all, affected by the incumbrance.

[Omitting a minor point.]

I am of opinion, for the reasons stated, to reverse the decree of the Chancery Court and give the appellant a decree for the amount of the insurance with interest and costs. .

MONROE, P., and CHRISTIAN and ANDERSON, JJ., concurred.
STAPLES, J., dissented.

Decree reversed.

SANDS v. CITY OF RICHMOND.

(31 Gratt. 571.)

Municipal corporation — authority to require lot owner to pave sidewalks.

A city ordinance, requiring the owners of lots on streets which have been graded, paved and guttered, to pave the sidewalks adjoining their lots, is valid, and if the owners do not comply, the city may do the work and collect the expenses from the owners.

THE opinion states the case.

Johnson, Williams & Bouloars and Sands, for appellant.

Keiley, for appellee.

STAPLES, J. The charter of the city of Richmond provides that whenever a new street shall be laid out, a street graded or paved, or any other improvement whatever made, the city council may determine what portion of any of the expenses thereof ought to be paid from the public treasury of the city, and what portion by the owners of real estate benefited, or may order and direct that the whole expense be assessed upon the owners of real estate benefited thereby. Under an ordinance adopted by the city council, whenever a street is opened, graded, guttered and curbed, in whole or in part, including the walkways, it is made the duty of the owner or owners of property along said street to pave the walkway the full width across their fronts with bricks, or such other material as the committee on streets may approve. Where the property corners on two streets,

the property owner shall pave the said walkway half the distance at his own cost, and the city half at its cost. If upon notice by the city fails to make such pavement, the engineer is authorized to do the work done by the city contractor, and the costs from the owner.

There are other provisions of the ordinance to which I have alluded, but they are not necessary to be cited here.

The appellant, acting as receiver by appointment of the Court of Richmond, in the case of *Atkinson v. City of Richmond*, was directed by the city engineer to pave the sidewalks under his control as such receiver. The appellant refused to comply with this order, the city engineer caused the sidewalks to be paved by the city contractor; and the question of the validity of this order was referred to the Chancery Court, from which the appellant appealed. That court sustained the claim of the appellant, and an appeal was taken by the latter.

In the petition for an appeal and in the argument already cited has been assailed on various grounds.

It is insisted that the assessments authorized by the ordinance are to be regarded as an exercise of the taxing power, and that the rule of uniformity and equality required by the Constitution is not to be so regarded, they are assessments of private property for public purposes without compensation. This question was fully considered in the case of *Ellis v. City of Richmond*, 26 Gratt. 224. It was there held that assessments are a peculiar species of taxation, and that they do not apply to the general burdens imposed upon persons for municipal purposes. They proceed upon the benefits conferred upon the persons liable to the assessment, and upon the value of their property by the improvement. It is not necessary now to go into the details of these propositions.

The validity and constitutionality of these assessments are sustained by an array of authority and force of reasoning to be decisive of the question. Most of the cases are to be found in 2 Dill. on Munic. Corp., §§ 596 to 618, and §§ 619 to 636. In *Cooley on Taxation*, 478, the whole subject is exhaustively discussed, and the authorities cited fully answer the objections to this species of taxation.

that a local assessment may so far exceed the limits of equality and reason, that instead of being a tax or contribution, it would practically amount to confiscation of the property benefited. In such

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paving the street adjacent to his property, partly upon the ground that such an improvement is for the public benefit, and that the lot is entitled to no peculiar use of the street not common to the rest of the street. The court concedes that the same rule does not apply to an assessment for the purpose of paving the sidewalk, in which the adjoining lot owner is recognized as having a peculiar interest and benefit distinct from the benefit which he enjoys in common with the rest of the community.

In his work on Taxation, Judge COOLEY strongly controverts the doctrine of justice as also the legality of assessing each individual lot its share of the cost of improvements along its front. The reason he assigns is that if every owner is compelled to construct the street in front of his lot, his tax is neither increased nor diminished by the assessments of his neighbors. Nothing is apportioned or divided between the lots, and each particular lot is in fact arbitrarily made a tract and charged with the whole expenditure thereon. In special and unusual circumstances the major part of the cost of an improvement of a public work may be expended in front of a single lot, thereby placing the lot owner in a position not at all contributing to make the improvements thus specially burdened more valuable, perhaps even having the opposite consequence.

The learned author nevertheless concedes that a different rule applies to assessments for the construction and repair of the sidewalks by the side of streets in cities and other populous places. He declares that the cases of assessments for the construction and repair of sidewalks are more distinctly referable to the power of police. The duty imposed upon the owners is enjoined as a regulation of police, made necessary by the peculiar interest such owners have in the walks, and by the fact that their situation gives them peculiar fitness and ability for performing the duty with promptness and convenience. The duty of putting the sidewalks in a proper state, and of afterwards keeping them in a condition fit for use. Upon these grounds the authority to establish such assessments has frequently been supported. Cooley on Taxation, § 100; see also *Mayor v. Maberry*, 6 Hun, 368; Cooley on Const. Law, § 100.

Whether the learned author is correct in referring the construction and repair of the sidewalk by the owner to the police power, or whether it belongs to the taxing power, it is not material to discuss. The power exercised by the municipal authorities of perhaps thirty of the cities of the United States under their respective charters is just and reasonable in itself; and, with a few exceptions, is sustained by the whole current of decisions.

The ordinance of the city of Richmond would seem to be peculiarly favorable to the owners of the lots, in merely requiring them to pave the sidewalks after they have been graded at the expense of the corporation ; and in the case before us the assessment does not appear to be extravagant or in excess of the benefits which the owners of the property will probably derive from the improvement. We are therefore of opinion that the ordinance is not obnoxious to any of the objections based upon the ground of its alleged illegality or unconstitutionality.

[Omitting minor points.]

This disposes of all the material points raised by the appellant. For the reasons stated, we are of opinion that none of them are valid, and the decree of the Chancery Court must be sustained.

ANDERSON, J., dissented.

Decree affirmed.

FROMMER v. CITY OF RICHMOND.

(21 Grant 642.)

Municipal corporation — license — non-resident — double taxation.

Defendant, living outside of a city, hired a stall and carried on the butcher's business in the city market. He owned carts and horses, which he used for carrying meat from his house to the stall and carrying back that which was unsold. He paid a property tax on the carts and horses at his residence. *Held*, that the city might legally exact a license fee for the use of them in the city, being thereto authorized by its charter.*

FINE for breach of a city ordinance. The opinion states the

Young, for appellant.

Keiley, for appellee.

CHRISTIAN, J. The court is of opinion that there is no error in the judgment of the Hustings Court affirming the judgment of the police justice.

* To same effect, *City of Memphis v. Bottelle*, 9 Heisk. 330, 94 Am. Rep. 223.

A fine was imposed on the plaintiff in error by the police of the city of Richmond for a violation of one of the city ordinances. On appeal to the Hustings Court that judgment imposing a fine was affirmed, and from this judgment of the Hustings Court the plaintiff in error applied to one of the judges of this court for a writ of *supersedeas*, which was accordingly awarded.

The bill of exceptions taken to this judgment of the Court sets out the following facts:

That the appellant, F. Frommer, is a butcher in the Second New market of this city, and is duly licensed as such by the city thereof, and occupies a stall therein, for which he pays tax to the city, according to the ordinances on the subject; that Frommer resides in the county of Henrico, about half a mile from the corporate limits of this city, and that his slaughter-houses are at the place of his residence, and slaughters there all cattle, sheep, etc., the meat of which is taken by him for sale at his said stall at said market; that he is the owner of two wagons, running on elliptic springs, which is kept at his said residence in the county, and one or the other of which is used by him daily in transporting his slaughtered meat from his slaughter-house every day to the said Second market-house in this city, where the same is to be sold, and in carrying back such meat as may not be sold, after the market hours are over; he also carries and delivers, during and after market hours, to the houses of such of his customers residing in said city as may order the same to be done, any meat so purchased by any of them from him, but that this is done without reward or hire. It further appears that said wagons are given in by said F. Frommer in his return to the commissioner of the revenue for said county for taxation, to law, as a part of his personal property in said county; F. Frommer also sells and delivers as aforesaid cured meats, but not exclusively, of his own curing — he occasionally buys of commission merchants in said city such cured meats as he orders for his customers over and above what he cures himself, which are sent to him by the said commission merchants. His meats are cured by himself, are slaughtered and cured at his said slaughter-houses in said county, where such animals as he purchases for his business are, when their condition requires it, fattened and slaughtered.

The fine imposed upon the plaintiff in error in this case was

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of his refusal to pay a license tax upon his wagons employed in transporting his meats from his slaughter-pens, situated a short distance outside the corporate limits, to his stall in the New market, and also delivering meats to his customers in different parts of the city. The city, under its general powers of taxation conferred by its charter, under the decision of this court in the case of *Ould v. City of Richmond*, 23 Gratt. 464, might have imposed this tax. But special authority is conferred upon the city authorities by the seventy-first section of its charter, in terms which cover this case, and leave no room for doubt or construction. That section provides as follows:

“§ 71. The council may grant or refuse licenses to owners or keepers of wagons, drays, carts, hacks and other wheeled carriages kept or employed in the city *for hire*, and may require the owners or keepers of wagons, drays and carts *using them in the city*, to take out a license therefor, and may require taxes to be paid thereon, and subject the same to such regulations as they may deem proper, and prescribe their fees and compensation.”

The plaintiff is an owner of wagons which he uses in the city in pursuit of his regular business, which is conducted in the city. It is difficult to conceive any just or reasonable ground why he should be exempted from the license tax required by the city authorities under the foregoing provisions of the city charter. His counsel in this court suggested two grounds for such exemption: First, that it was the policy of the law to relieve butchers from taxation in order to cheapen the articles of prime necessity, which he furnishes to the people of the city; and second, because he lives outside of the corporate limits; that the wagons are not kept in the city for hire, and these same wagons are taxed as personal property in the county of Henrico.

As to the first suggestion, it is sufficient to remark that the same argument was zealously pressed in the case of *Sledd v. Commonwealth*, 19 Gratt. 813. But this court held upon the construction of a statute, certainly not more comprehensive in its terms than the provision of the charter above referred to, that butchers were liable to the tax.

It is to be observed that the tax imposed is for a license to use his wagons on the streets of the city in the pursuit of his business in the city. It is difficult to imagine why the owners of drays, wagons and carts used in the transportation of flour in the city should be required to pay a license tax, while the same vehicles used in transporting

meats are to be free from such license tax. Meat is certainly more an article of prime necessity than bread.

It is further insisted that the city cannot impose this tax if these wagons are kept in the county of Henrico, and are not in that county. But the question is not where the wagons are kept, but where they are used in the city in the business of the butcher, whose place of business is in the city? If so, they clearly come within the provisions of the charter, as liable to the license tax. The construction of the city ordinance, as contended for by the counsel for the plaintiff in error, cannot be maintained. It is manifest that the ordinance embraces wagons *employed* in the city, as well as those *kept* in the city. It can make no difference that the wagons are *kept* on the streets just outside of the corporate limits, if they are used or employed on the streets of the city in his business conducted in the city.

Nor does the fact that the county of Henrico taxes these wagons as personal property make any difference. They are not the personal property of the plaintiff in error, subject to his control. It is in no sense a double tax; the city does not tax them as property, but simply requires a license for the privilege of using them in the conduct of his business in the city. The city is subjected to a constant and enormous expense in repairing and keeping its streets in order. This license tax is intended to meet in part this burden; and it is not only a legitimate but a most appropriate mode of reimbursing the city, because it is the use of vehicles on the streets that causes, in the main, their wear and tear.

We are therefore of opinion that there is no error in the judgment of the Husting Court, and that the same be affirmed.

It is proper to remark that there may be a question whether the court has jurisdiction in this case, it having originated in a matter of police justice and the fine being only ten dollars, but we do not deem it necessary to pass upon that question, inasmuch as we are bound by the judgment of the court below, and as it is desirable that the matter should be settled upon its merits.

Judgment affirmed.

RICHMOND AND DANVILLE RAILROAD COMPANY v. ANDERSON'S ADM'R.

(81 Gratt. 812.)

Negligence — contributory — when a defense.

In an action of negligence, although the plaintiff's negligence may have contributed to the accident, yet he may recover if the defendant could have avoided the injury by the exercise of ordinary care, * but not otherwise.

ACTION of negligence. The opinion states the case. The plaintiff had judgment below.

H. H. Marshall and W. W. Henry, for appellant.

Irving & McKinney, Fitzgerald, and Guy & Gilliam, for appellee.

BURKS, J. An action was brought in the court below, under the statute, Code of 1873, chap. 145, §§ 7, 8, 9, 10, by the personal representative of W. W. Anderson, Sr., deceased, against the Richmond and Danville Railroad Company, to recover damages resulting from the death of said decedent, caused, as alleged, by the negligence of the said railroad company.

The plea was "not guilty." On the trial of the issue joined on that plea, the defendant demurred to the evidence. Upon the demurrer, the court rendered judgment in behalf of the plaintiff for the amount of damages conditionally assessed by the verdict of the jury. The judgment is to be now reviewed on a writ of error awarded by one of the judges of this court on the application of the defendant.

Negligence is the gist of this action. If the injury which resulted in the death of the plaintiff's intestate, was occasioned by the negligence of the defendant, and solely by such negligence, there can be no doubt of the plaintiff's right to recover damages for the injury; but if there was negligence on the part of the defendant, and also on the part of the deceased, and the negligence of the latter contributed to the injury, the right of recovery depends upon the circumstances.

* To same effect, *Pennsylvania Co. v. Sinclair* (62 Ind. 301), 30 Am. Rep. 125, and note 125.

The *Richmond and Danville R. R. Co. v. Morris*, a recently decided by this court, was a case in which the plaintiff and defendant were mutually in fault, and the combined or concurrent negligence of the parties was the proximate cause of the injury which the action was brought. The negligence of each party was proximate to the injury, both in the order of time and in the degree. The negligence of the conductor in putting the train in motion immediately after he had awakened Morris the last time and in not stopping to get off, and before he had time to get off, concurring with the negligence of Morris, after he had received the direction from the conductor, in walking to the rear of the train and jumping off, when the train was backing, instead of stepping out upon the platform, might have done safely and conveniently, caused the injury complained of. This court did not undertake, in that case, to determine the law on the subject of contributory negligence further than was applicable to the particular case, as will appear by the extract from the opinion of the court: "The reports are full of cases expounding and illustrating the doctrine of contributory negligence, and there is more or less conflict in the decisions, and a diversity of circumstances in the cases. Attempt to reconcile them would be labor to no useful purpose. We shall make no attempt. We think the law on the subject applicable to such cases as we have to deal with is correctly laid down by the Court of the United States, in the recent case of *Railroad v. Jones*, 95 U. S. 439."

The rule stated by Mr. Justice SWAYNE in the case of *Richmond and Danville R. R. Co. v. Morris* (which was approved by this court), so far as it relates to contributory negligence, is certainly the correct rule, if limited in its application to cases like the one then under consideration by this court, of mutual or concurring negligence. This rule, in its restriction, is stated by Chief Justice BLACK in the extract which we have taken from his opinion in *Railroad Company v. Aspell*, 23 Penn. 149. "It has been a rule of law from time immemorial, and is not likely to be changed in all time to come, that there shall be no recovery for an injury caused by the mutual fault of two parties. When it can be shown that it would not have occurred except for the culpable negligence of the party injured, and with that of the other party no action can be maintained."

While it is true, however, that where the negligence of one party concurring with that of the other is the proximate cause of

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neither can maintain an action against the other for such injury, because, among other reasons, the damages resulting from the injury cannot be apportioned, yet it is equally true that a plaintiff may, under certain circumstances, be entitled to recover damages for an injury although he may by his own negligence have contributed to produce it.

The rule as stated by Mr. Justice SWAYNE in *Railroad Co. v. Jones*, *supra*, approved by this court in *Railroad Co. v. Morris*, is taken almost literally from the opinion of Mr. Justice WIGHTMAN in *Tuff v. Warman*, 5 Q. B. N. S., 94 E. C. L. R. 573. So much only was quoted from the opinion in the English case as was deemed applicable by the Supreme Court, and afterwards by this court, to the facts in the cases respectively to which the rule was applied.

Reference to the case of *Tuff v. Warman*, will show the rule as extracted by the Supreme Court, and also a qualification of that rule, which was not noticed.

Mr. Justice WIGHTMAN, delivering the judgment of the court in the exchequer chamber, on an appeal from a decision of the Court of Common Pleas, said: "It appears to us that the proper question for the jury in this case, and indeed in all others of the like kind, is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. In the first case, the plaintiff would be entitled to recover; in the latter, not; as but for his own fault, the misfortune would not have happened."

The foregoing is what was quoted in *Railroad Co. v. Jones* and *Railroad Co. v. Morris*, and was all-sufficient for the purposes of these cases under the facts. But the English judge, in his opinion, adds this important qualification to what he had said: "Mere negligence or want of ordinary care or caution would not, however, disentitle him (the plaintiff) to recover, unless it were such that but for that negligence or want of ordinary care and caution the misfortune could not have happened; nor if the defendant might, by exercise of care on his part, have avoided the consequence of the neglect or carelessness of the plaintiff."

"This," he says, "appears to be the result deducible from the opinion of the judges in *Butterfield v. Forrester*, 11 East, 60; *Bridge*

v. *Grand Junction Railway Co.* 3 M. & W. 244; *Davies v. Mann*, 10 M. & W. 545; *Dowell v. General Steam Navigation Co.* 5 E. & B. 194, E. C. L. R., vol. 85."

Such is the English rule; and it is said by Judge COOLEY, in his recent treatise on Torts, that it has been accepted by the courts in this country with few exceptions. See Cooley on Torts, 875, and the great multitude of American cases cited in a note as following the English rule.

In a case decided by the House of Lords very recently (1876), on appeal from the Exchequer Chamber, the rule, in substantially the same form, or to the same effect, has been reiterated. Lord PENZANCE, in delivering the judgment, which was concurred in, said: "The first proposition is a general one, to this effect: that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care, which contributed to cause the accident.

"But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." And his lordship adds: "This proposition, as one of law, cannot be questioned. It was decided in the case of *Davies v. Mann* (10 M. & W. 545), supported in that of *Tuff v. Warman* (5 C. B. N. S. 579) and other cases, and has been universally applied in cases of this character without question." *Radley v. London and Northwestern Railway Co.*, L. R. 1 App. Cas. 754, 759.

Although there is some conflict in the American decisions, the weight of authority seems to be very decidedly in favor of the English rule, and the rule itself appears to me to be a just and reasonable one. It cannot be expected that the numerous American decisions on this subject could be examined within the limits of this opinion. I refer again to the cases cited in the note in Cooley on Torts, *ubi supra*, and content myself with a notice of a few cases cited in argument by the learned counsel for the defendant in error.

In the opinion of the court, delivered by ISHAM, J., in *Thow v. Vt. Central R. R. Co.*, 24 Vt. 487, 495, which seems to be a well-considered case, and has been often cited with approbation in other cases, it is said, that when there has been mutual negligence, and the

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negligence of each party was the proximate cause of the injury, no action whatever can be sustained; the words "proximate cause" being used in the opinion as indicating negligence occurring at the time the injury happened. In such case no action can be sustained by either, for the reason that as there can be no apportionment of damages, there can be no recovery. So where the negligence of the plaintiff is proximate, and that of the defendant remote, or consisting of some other matter than what occurred at the time of the injury, in such case no action can be maintained, for the same reason that the immediate cause was the act of the plaintiff. Under this rule falls that class of cases where the injury arose from the want of ordinary or proper care on the part of the plaintiff at the time of its commission. On the other hand, when the negligence of the defendant is proximate, and that of the plaintiff remote, the action can then well be sustained, although the plaintiff is not entirely without fault. This seems to be now settled, says the judge, in England and in this country. Therefore, if there be negligence on the part of the plaintiff, yet if at the time when the injury was committed it might have been avoided by the defendant in the exercise of reasonable care and prudence, an action will lie for the injury. In support of these propositions the following English authorities were cited: *Davies v. Mann*, 10 M. & W. 545; *Mayor of Colchester v. Brooke*, 53 Eng. C. L. 339; 3 M. & W. 244, and other cases.

In the case often cited of *Kerwhaher v. Cleveland, Columbus and Cincinnati R. R. Co.*, 3 Ohio St. R. 172, it is said, that the liability to make reparation for an injury by negligence is founded upon an original moral duty, enjoined upon every person, so to conduct himself or exercise his own rights as not to injure another; that the mere fact that one person is in the wrong does not necessarily discharge another from the due observance of proper care towards him, or the duty of so exercising his own rights as not to do him an unnecessary injury; and that the doctrine, that in the case of an injury by negligence, where the parties are mutually in fault, the injured party is not entitled to redress, is subject, as appears from a review of the decisions both in England and in this country, to material qualifications, among which are the following: First, the injured party although in the fault to some extent at the time, may notwithstanding this be entitled to reparation in damages for an injury, which he has used ordinary care to avoid; second, when the negligence of the defendant in a suit upon such ground of action is the proximate

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cause of the injury, but that of the plaintiff only remote, consisting of some act or omission not occurring at the time of the injury, the action is maintainable.

To the same effect are the following cases: *Northern Central Railway Co. v. State*, 17 Md. 8; *Baltimore and Ohio R. R. Co. v. State*, 33 id. 542; *Brown v. Hannibal and St. Joseph R. R. Co.*, 50 Mo. R. 461; *S. C.*, 11 Am. Rep. 420; *Central R. R. and Banking Co. v. Davis*, 19 Ga. 437; *Isbell v. New York and New Haven R. R. Co.*, 25 Conn. 556; *Macon and W. R. R. Co. v. Davis*, 18 Ga. 679; *Herring v. Wil. and Raleigh R. R. Co.*, 10 Ired. (L.) 402. *Balt. and Ohio R. R. Co. v. Sherman's Adm'r*, 30 Gratt. 602; and *same plaintiff v. Whittington's Adm'r*, id. 805, recent decisions by this court, have an important bearing on the case now under consideration, as illustrating the doctrine of negligence as applied to railroad companies. See, also, what is said in *Sher. & Red on Neg.*, §§ 25, 494 (3d ed.); *Whart. on Neg.*, § 388.

[Omitting a discussion of the evidence.]

There are two propositions which, in my judgment, are sufficiently established by the evidence.

First. But for the negligence or want of ordinary care and caution of the plaintiff's intestate the misfortune — the loss of his life — could not have happened.

He was in fault in going upon the track of the railroad. The defendant was the owner in fee simple of the road, and entitled to the full, free, exclusive and uninterrupted use of it. This the deceased knew. He had no right to use the track at all as a way to reach his home, but he entered upon it on this occasion under circumstances which indicated that the use of it would be attended with rather more than ordinary peril. He did not attempt merely to cross the track when no train was near, nor to walk along it when no train was approaching; but having the convenience of a road leading directly to his house, and with a full knowledge that the train would be due at the station in thirteen minutes according to the schedule time, he voluntarily and without license started upon the track in the direction from which the expected train was to come, and which, if it arrived at the usual time, he would almost necessarily meet before he reached the point at which he would leave the track for his home. But for this wrongful and incautious conduct on his part the misfortune which befell him could not have happened.

Second. The defendant exercised ordinary care and caution, and

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yet could not, by the exercise of such care and caution, avoid the mischief which happened.

It is not necessary to recapitulate the evidence which establishes this proposition. It is sufficient to say that the engineer did not see deceased on the track until it was too late, notwithstanding the prompt and energetic use of all the means in his power to avert the mischief which happened, and that he did not see him sooner was owing to causes from which no negligence in the defendant or its agents can be properly inferred.

If there had been no demurrer to the evidence in this case, and the jury had rendered a verdict for the plaintiff, it would have been the duty of the judge presiding at the trial to set aside the verdict, on the ground that the evidence was plainly insufficient to warrant it.

It follows that, in my opinion, the judgment of the Circuit Court is erroneous and should be reversed, and that final judgment should be rendered by this court on the demurrer to evidence in favor of the defendant (the plaintiff in error here).

The other judges concurred in the opinion of BURKE, J.

Judgment reversed.

NOTE. — The reporter has omitted to take from the present volume of Gratton, three cases which would be of sufficient importance and interest to find a place in this series, if they had not been pronounced by a bare majority of the court. They are the following: *Switzerland v. Old Dominion Ins. Co.*, p. 176 — a policy of insurance, conditioned to be void in case of other insurance without indorsed consent, is not avoided by another insurance with the like condition. This case is of first impression in Virginia. *Boynton v. McNeal*, p. 456 — a homestead right is not lost by a grant of the premises subsequently set aside as fraudulent as against the grantor's creditors. Following *Ships v. Repass*, 28 Gratt. 716. The opinion however is mainly embraced in the note, *ante*, p. 645. *Danville Bank v. Wallditt's Admr.*, p. 469 — in an action of *assumpsit*, to recover money deposited for safe-keeping with the defendant, and of which he claims to have been robbed, evidence proffered by him of his general good character is not admissible, and his failure to produce it is no ground for an inference unfavorable to his integrity.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA.

SWEENEY V. BAKER.

(13 W. Va. 106.)

Slander and libel — candidate for office — privileged publication.

To charge a candidate for a popular office with being uneducated, lazy, idle and ignorant, is not libelous; nor is it libelous *per se* to charge him with being "a social leper" who should be "deodorized." But otherwise to charge him with being a professional gambler, bully, thief and whore-master.*

ACTION of libel. The facts sufficiently appear in the opinion. The plaintiff had judgment below.

W. W. Arnett, R. G. Barr, James M. Morrow, William W. Gordon, for plaintiff in error.

E. G. Cracraft, W. P. Hubbard and Daniel Lamb, for defendant in error.

GREEN, President. Before considering directly the questions involved in this case, I will briefly consider the rights and duties of the parties to this action, arising from their relations to each other.

The plaintiff was a candidate to represent the county of Ohio in the House of Delegates of the State of West Virginia; and the

* See *Tilson v. Robbins* (85 Me. 205), 25 Am. Rep. 50; *Barr v. Moore* (97 Penn. 302), 29 Am. Rep. 207.

defendants were proprietors of the *Wheeling Daily Register*, a newspaper published in said county. A newspaper proprietor is just as liable, for what he publishes in his newspaper, as any other person; and he is liable in the same manner and to the same extent. The law takes no cognizance of newspapers; and there is no distinction between the publication by the proprietors of a newspaper, and a publication by any other person.

The terms "freedom of the press" and "liberty of the press" have misled some to suppose that the proprietors of a newspaper had a right to publish that with impunity, for the publication of which others would have been held responsible. But the proper signification of these phrases is, if so understood, misapprehended. The "liberty of the press" consists in a right in the conductor of a newspaper to print whatever he chooses without any previous license, but subject to be held responsible therefor to exactly the same extent, that any one else would be responsible for the publication.

In the case of *Stebbins v. Merritt*, 10 Cush. 25, the instruction given by the court below, and approved by the Supreme Court, was: "It has been urged upon you, that conductors of the public press are entitled to peculiar indulgence, and have especial rights and privileges. The law recognizes no such peculiar rights, privileges, or claims to indulgence. They have no rights but such as are common to all. They have just the same rights that the rest of the community have, and no more. They have the right to publish the truth, but no right to publish falsehoods to the injury of others with impunity."

In *Davidson v. Duncan*, 7 El. & Bl. 231 (90 Eng. C. L.), COLBRIDGE, J., says: "There is no difference in law whether the publication is by the proprietor of a newspaper or by some one else. There is no legal duty on either to publish what is injurious to another; and if any person does do so, he must defend himself on some legal ground."

But the fact that one is a candidate for an office in the gift of the people affords in many instances a legal excuse for publishing language concerning him as such candidate, for which publication there would be no legal excuse, if he did not occupy the position of such candidate, whether the publication be made by the proprietors of a newspaper, or by a voter, or other person having an interest in the election. The *conduct and actions* of such candidate may be freely commented upon; his *acts* may be canvassed, and his *conduct* boldly censured.

Nor is it material that such criticism of *conduct* should in the estimate of a jury be just. The right to criticise the *action* or *conduct* of the candidate is a right, on the part of the party making the publication, to judge himself of the justness of the criticism. If he was liable for damages in an action for libel for a publication criticising the *conduct* or *action* of such a candidate, if a jury should hold his criticism to be unjust, his right of criticism would be a delusion, a mere trap. The only limitation to the right of criticism of the *acts* or *conduct* of a candidate for an office in the gift of the people is, that the criticism be *bona fide*. As this right of criticism is confined to the *acts* or *conduct* of such candidate, whenever the *facts*, which constitute the act or conduct criticised, are not admitted, they must, of course, be proven. But *as respects his person* there is no such large privilege of criticism, though he be a candidate for such office.

This large privilege of criticism is confined to his *acts*. The publication of defamatory language, affecting his moral character, can never be justified on the ground that it was published as a criticism. His talents and qualification mentally and physically for the office he asks at the hands of the people, may be freely commented on in publications in a newspaper, and though such comments be harsh and unjust, no malice will be implied; for these are matters of opinion, of which the voters are the only judges; but no one has a right by a publication falsely to impute crimes to such a candidate, or publish allegations falsely affecting his character.

In *Commonwealth v. Clapp*, 4 Mass. 163, Chief Justice PARSONS says: "When any man shall consent to be a candidate for public office, conferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office;" but he adds: "The publication of falsehood and calumny against public officers, or candidates for public offices, is an offense most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens, to their great injury, and it may be to the loss of their liberties."

In *Mayrant v. Richardson*, 1 Nott. & M. 348, where the words complained of were spoken and written of a candidate for congress, and were substantially that his mind was so impaired and weakened by disease that it could not be depended upon, though special damages were laid, yet the court held on demurrer that the action could not be sustained, though the language used was false and malicious,

though had the words used or letters written imputed a crime or moral delinquency, the action would have lain. Justice Morr, in delivering the opinion of the court, says: "When one becomes a candidate for public honors he makes a property of himself for public investigation. All his pretensions become the proper subjects of inquiry and discussion. He makes himself a species of public property, into the qualities of which every one has a right to inquire, and of the fitness of which every one has a right to judge, and give his opinions. The ordeal of public scrutiny is many times a disagreeable and painful operation; but it is the result of freedom of speech, which is a necessary attribute of free government; and the same may be said of freedom of the press."

The authorities fully sustain the position, that a publication in a newspaper made either of a public officer or of a candidate seeking an office from the votes of the people, which imputes to him a crime or moral delinquency, is not a privileged publication, either absolute or conditional; but such a publication is *per se* actionable, the law imputing malice to the author or publisher. See *Curtis v. Mussey et al.*, 6 Gray, 281; *Aldrich v. Press Printing Co.*, 9 Minn. 133; *Seeley v. Blair*, Wright, 358, 683; *Root v. King*, 7 Cow. 613; *King v. Root*, 4 Wend. 113; *Harwood v. Astley*, 1 B. & P. 47; *Duncombe v. Daniel*, 8 C. & P. 222.

In most of these cases the distinction I have drawn, between cases where the libelous charges published against public officers elected by the people, or candidates for public office before the people, merely refer to the mental or physical condition of the party to fill the office, and cases where the libelous charge imputes crime or moral delinquency, is either not made at all, or but vaguely alluded to; but an examination of these will show, that in the particular case before the court, which was being commented upon, the libelous charge, which the court held was actionable *per se*, was in every case a charge imputing crime or moral delinquency.

Thus in the case of *Curtis v. Mussey*, 6 Gray, 373, the court say: "The want of actual interest, to vilify or libel the plaintiff, rendered the publication no less a libel, if such were the natural effect of the words published. There were passages in the publications, which appear on their face to be libelous, such as the charge of legal jesuitism; the companion to Pilate and Judas; the charge of prejudice and want of feeling; the assertion that the decision of the commissioner was a partisan and ignoble act. The statements com-

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plained of were not privileged communications, and as discussions upon a matter of public interest, do not appear to be justified, because they charge the plaintiff with corrupt and improper motives, and because the answer did not aver their truth."

It will be observed that the court thus selected, as not privileged publications, such portions of the charge as clearly impute moral delinquency, and tacitly recognize the distinction I have drawn.

In the case of *Aldrich v. Press Printing Co.*, 9 Minn. 138, it does not appear what the charges published in a newspaper against the plaintiff were; but we may from the report fairly infer that they were either direct charges of crimes, or imputed to him moral delinquency. The court say: "Freedom of the press and freedom of speech are equally protected by the Constitution. In this country almost all offices are elective. The press does not possess any immunities, not shared by every individual. In every election the same freedom of discussion of the merits and demerits of candidates is allowed to the press and people. Nor can it be said, that every household visitation, made by itinerant politicians, poisoning the minds of electors with libelous and scandalous charges against candidates, every public harangue, filled with similar matter, every club-room discussion, in which such charges are bandied about with licentious freedom and exaggeration, are privileged communications, and impose upon the injured party the necessity of proving, that they were uttered and published with express malice. We have never supposed, that the freedom of speech, even in this country, could legally be carried to such extent. Yet if such is the law, as to an article published in a public journal, there can be no good reason shown, why it does not extend to all channels of communication between man and man during the pendency of an election. We think a public journal, or an individual, who indulges in defamatory assertions about candidates for office, is equally liable for his acts with those, who commit the same offense against private individuals."

I think it is obvious that the defamatory assertions, alluded to in this opinion, are charges of crimes or imputations of moral delinquency.

In *Seeley v. Blair*, Wright, 358, the charge was of perjury. The court say: "If one accuse another of crime, he is presumed to make a false accusation; and malice is inferred from the falsehood. That the plaintiff was a candidate for office is no excuse for slandering him. We have no right to tell a lie of another, because he is a candidate

for office, or is in office; though we may speak the truth of him, we have no right to bear false witness against our neighbor. It would subvert our government, to allow the promulgation of falsehood, which would drive from office men, who regard character, and leave it only to those without any." And in a suit between same parties, Wright, 686; the charge was forgery. The court say: "As to the point urged that the plaintiff was a candidate for office, and the defendant an elector, I need only say, the relation of the parties to each other, or to the public, confers upon the defendant no right to utter falsehood and calumny. An elector may freely canvass the character and pretensions of officers and candidates; but he has no right to calumniate one, who is a candidate for office, with impunity. If the law sanctioned such a course, it would drive good men from the administration of public affairs, and throw our government into the hands of the worthless and profligate."

The same judge pronounced this opinion in each of these cases; and it would not be a just inference from his saying, that an "elector may freely canvass the character of a candidate," that he could make allegations imputing moral delinquency on the one hand, and on the other it would not be just from his saying, "that the plaintiff was a candidate for office is no excuse for slandering him," to infer that every publication, made in reference to a candidate, though not reflecting on his moral character, would be regarded as libelous, which would be so held if made with reference to a mere private person.

In the cases of *Root v. King*, 7 Cow. 613, and *King v. Root*, 4 Wend. 113, the publication in a newspaper was that Lieutenant-Governor Root, while presiding over the senate, was disgustingly drunk; and that he was an habitual drunkard. The chief justice delivering the opinion of the court says, "that malice is to be implied, and is inferable, from the libelous character of the publication and its falsity. I fully subscribe to the doctrine of Chief Justice PARSONS (4 Mass. R. 169) that when any man shall become a candidate for an elective office, he puts his character in issue in respect to his fitness and qualification for the office; that the publications of truth on that subject are not libelous; and that the publications of falsehood against public officers or candidates deserve punishment. I know of no decision which goes the length of justifying unbounded slander on such occasions."

In the same case, on an appeal to the court of errors, Chancellor WALWORTH says: "It is supposed by the counsel of the defendants,

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that an editor of a public paper may publish what he pleases of a candidate for public office with impunity, provided he satisfies the jury he believed it to be true, or that he had no ill will against the person injured. Malice is said to be the gist of the action. But this certainly does not mean malice or ill will towards the individual, in the ordinary sense of the term. If such were the case, an action would not lie against the proprietor of a paper for libel, published in his absence, or without his knowledge, but that such action would lie is settled law. *Andres v. Wells*, 7 Johns. 260. In ordinary cases of slander the term, maliciously, means intentionally and wrongfully. Malice is an implication of law from the false and injurious nature of the charge." And again: "It is however insisted that this libel was a privileged communication. If so, the defendants were under no obligation to prove the truth of the charge; and the party libeled had no right to recover, unless he established malice in fact, or showed that the editors knew the charge to be false. The effect of such a doctrine would be deplorable. Instead of protecting, it would destroy, the freedom of the press, if it were understood that an editor could publish what he pleased against candidates for office, without being answerable for the truth of such publication. No honest man could afford to be an editor; and no man, who had any character to lose, would be a candidate for office under such a construction of the law of libel. The only rule to adopt in such cases is to permit editors to publish what they please in relation to the character and qualifications of candidates for office, but holding them responsible for the truth of what they publish."

This language would seem to put allegations in reference to qualifications not involving character, upon the same footing as allegations imputing moral delinquency. And this may have been the view of Chancellor WALWORTH; but as the charge in the particular case he was considering was a charge that the candidate was an habitual drunkard, which involves moral delinquency, it would not, perhaps, be right to give to the chancellor's language a larger meaning than that an editor should be held responsible for the truth of such allegations.

In the case of *Harwood v. Astley*, 4 B. & P. 47, the words which were the basis of a suit, were uttered against a candidate for parliament, and were: "Sir Jacob Astley is a scoundrel, a coward, a liar, an assassin and a murderer." Sir JAMES MANSFIELD, chief justice, says: "It seems to be supposed that the situation of a candidate for

parliament is such as to make it lawful for any man to say anything of him. To that proposition I cannot assent. It would be a strange doctrine indeed that when a man stands for the most honorable position in the country, any person may accuse him of any imaginable crime with impunity. The particular situation of the plaintiff cannot prevent the words from being actionable."

No inference can be drawn that the court in this case would have held that words asserting the mental or physical disqualifications of a candidate, though published and false, would have sustained an action.

In the case of *Duncomb v. Daniel*, 8 C. & P. 222 (34 Eng. C. L. R. 61), the basis of the action of libel was a letter published in a newspaper, charging a candidate for parliament with cheating in two transactions named. Lord DENMAN, chief justice, said: "It appears to me the occasion did not justify the present publication. However large the privilege of electors may be, it is extravagant to suppose that it can justify the publication to all the world of facts injurious to a person who happens to stand in the situation of a candidate." It seems to me but fair to interpret this language, in view of the facts of the case, as meaning "injurious to the moral character of a candidate."

These decisions are not, I think, when considering the facts of the cases in which they were delivered, inconsistent with the proposition I have stated that a candidate for the suffrages of the people cannot complain that his talents and qualifications mentally and physically for the office he seeks are commented on in the newspapers, even though these comments be ever so malicious and unjust. When he becomes such a candidate, all his pretensions become the proper subject of inquiry and discussion, so far as his fitness for the office either mentally or physically, is concerned. The public interest requires that this discussion should be untrammelled; and that no one should be held liable for anything he may publish concerning the fitness of such candidate, mentally or physically, for the office he seeks. For if his liability for publications in reference to such candidate's fitness in these respects depended on the judgment of a jury, whether the publications were either true or free from malice, the public interest must suffer; as the apprehension, caused by such a liability, would prevent that free discussion of the fitness of candidates for popular suffrage, which is absolutely essential to the successful operation of a republican government. And the public

Interest further requires that the conduct and acts of such a candidate be freely criticised in the newspapers, and that there shall be no liability incurred for such criticism, though it be ever so unjust, provided it be *bona fide*, and provided the facts constituting such acts or conduct criticised are proven to be true. But public policy forbids that the moral character of such a candidate should be falsely assailed in the newspapers, or that he should be falsely charged by publications in newspapers with crimes. If the newspaper press was allowed to be licentious, the result would be to drive from the control of newspapers all men of character, and to deter from seeking office all but the profligate and abandoned. Nor would the result be different if a belief in the facts, on which such false and libelous allegations were based, was held to be a legal excuse for publications of this character against such candidates. To justify such a publication, it must be proven that the allegation is true in fact.

Applying this law to the case under consideration, as the declaration itself shows on its face that when the alleged libels were published, the plaintiff was a candidate for popular suffrage in Ohio county, any allegations which referred to his fitness for the office he sought, mentally or physically, were privileged publications, and could not be the basis of a libel suit; nor any other allegations which did not refer to his moral character, though they were ever so harsh and uncomplimentary.

The declaration contains several allegations of this character, which are complained of as libelous, such as the "laboring men were taught to believe, that a certain candidate (meaning the plaintiff), who never did an honest day's work, is their especial champion and friend," "a confessed ignoramus, he argues that intelligence should control the election" (meaning thereby that the plaintiff was publicly and confessedly known to be a man of great ignorance) and "the laboring men of Wheeling are asked to vote for a man who never earned an honest penny, or did a stroke of labor in his life. Honest industry loathes such associations. Vote for Pannell."

These statements, published about a candidate for popular suffrage are not libelous. They amount only to allegations that he is an uneducated, lazy and ignorant man, and as such he is unfit to represent the people. Such allegations may be made about a candidate for such position, and are not rendered libelous by being expressed

in coarse and harsh language. Such language may show ill will on the part of the publisher; but such a publication being absolutely privileged, its malicious insertion in a newspaper does not render it a legal basis for a libel suit.

There are also other allegations in the declaration, which are not *per se* libelous when published with reference to a candidate for such position; but which, explained by a proper inducement and accompanied by a suitable innuendo, would be libelous, such as these: "No man in the community has any interest in seeing the county disgraced by sending a social leper to speak and act for her in public councils," and "it is as much the duty of a citizen to vote against Jimsweeney to-day, as it would be to deodorize against the cholera." This language charges that the candidate is utterly unfit to be received into decent or polite society. If this unfitness was alleged to arise from his total want of education, his rude, unpolished or vulgar manners, his disgusting or filthy mode of dressing, such allegations, published against a candidate for such a position, would be absolutely privileged. They would be no assault on his moral character. His ignorance, stupidity, rudeness of manners or filthy habits of dress might be freely commented on; and whether allegations of this character were true or false, uttered maliciously or in good faith, they could not be the basis of a libel suit. On the other hand, the meaning to be attached to the words, he is a "social leper," and the obnoxious word "deodorize," as used above, may be that his moral traits of character are such as require his banishment from society. If there was an inducement and innuendo, which fairly interpreted would give this meaning to these phrases, then they would be libelous; but unexplained, they are not, I think, libelous, when published against a candidate for such position.

But there are in the declaration charges of the publication by the defendants of a large number of allegations, which, though published against a candidate for such position, are unquestionably libelous, and not entitled to be considered privileged publications, absolute or conditional. They are violent assaults on his moral character, which, if untrue, which the law presumes them to be, unless the contrary is shown, are gross outrages, the publication of which would not be justified, though the publisher believed them to be true, and had probable cause for so believing. Such publications can only be justified by proof of their truth.

Such is the character of the following statements, published by the

defendants : "A professional gambler, he preaches morality;" "let the people of Ohio county not select a representative from the prize ring or gambling den;" "the noble game of draw poker is a candidate for popular suffrage to-day. It runs on the same ticket with the manly art of fist and skull;" "as a political argument the fist of a bully and the kit of a gambler are not entirely satisfactory," "bullies and blacklegs are supposed to be an inevitable evil, the buzzards and body-snatchers of society;" "when the bully and the blackleg presents his personal and professional issue for approval at the polls, it is safe to be presumed, the intelligence and respectability of the community will decide it to his satisfaction;" "would you select a man to make laws, whom you would kick out of your house, and whom you wouldn't trust in your hen coop?" "we are not disposed to believe that Ohio county people are going to vote to-day for rowdyism and the pimpery of the faro bank;" "if Jim-sweeney can be sent to Charleston, he might be induced to take a faro kit with him, and enliven the tedium of legislation with the ennobling diversion which has brought such bright laurels to his brow;" and "not now, for the first time, do we summon the people of this county to cast their ballots against the boozing-ken, the sweat-cloth and the bagnio."

These publications amount to charging, that the plaintiff was a professional gambler, a bully, a thief and a whore-master. If this were true, these publications were entirely justifiable. Any citizen would have a perfect right, by such publications, to warn the people against electing to the legislature a man of such infamous character. If the truth was not a complete justification of such a publication against a candidate for popular suffrage, our legislative halls might, and probably would, be filled with scoundrels of the lowest kind. The preservation of a republican government requires, that when a man of such character offers himself as a candidate for popular suffrage, any citizen through the newspaper press, may expose the infamous character of the candidate, and thus avoid the imposition on the people of such men to office.

On the other hand a person, who publishes in a newspaper falsely, that a candidate for such an office is a professional gambler, a bully, a thief and a whore-master, ought to be severely punished. The fact that the party is a candidate for an office to be bestowed by the votes of the people, so far from its being a justification for such falsehoods, makes the outrage greater. If published against a pri-

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vate person not seeking such an office, it is admittedly a great outrage, for which the law affords redress not only by civil action by the party injured, but also by indictment. But if such falsehoods are published against a candidate for popular suffrage, the outrage committed is still greater. If it were allowed by law to be done with impunity, it would be utterly destructive of a republican government. Who would be a candidate for office in such a government, if falsehoods of this infamous character could be published against him? None would be such candidates but abandoned men, who had no respect for their characters. And how intolerable would the government become, whose offices were filled by men of such character! The law, as well as the juries, must suppress such licentiousness of the press.

It is proper to say, that what I have said with reference to the right to publish certain remarks in a newspaper relative to a candidate for an office, within the gift of the people, should be understood as confined to candidates for office to be elected by the people, and cannot be extended to candidates for an office, the appointment to which is made by a board of limited members, such as a city council. The right, to make unjust and false commentaries on the qualifications of a candidate for an office of this description, is much more limited. See *Kren v. Bennett*, 19 N. Y. 174.

[Omitting other matters.]

All concurred.

Judgment affirmed.

BANK OF THE OHIO VALLEY v. LOCKWOOD.

(18 W. Va. 392.)

Negotiable instruments — alteration — renewal.

A promissory note, payable "at the banking house of Hoge, Sheets & Co., Bellaire, Ohio," was indorsed for accommodation, by the defendants and by others, and afterwards, without the consent or knowledge of the defendants, the maker altered the place of payment to "National Bank of West Virginia, at Wheeling," and it was negotiated for his benefit to a *bona fide* purchaser. That note was twice renewed, the defendants and others indorsing both renewals, and the original and the first renewal note being surrendered. In an action upon the last renewal, *held*, that although the alteration of the orig-

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inal note would have discharged the defendants, yet the renewals were upon a new consideration, namely, the extension of time to the maker, and the defendants were liable.

ACTION upon a promissory note. The defendants, Edwards and Lockwood were accommodation indorsers, with others. The note was a second renewal of one which was made by the same maker, and indorsed by the defendants, as accommodation indorsers, with others. As drawn the original note was payable "at the banking house of Hoge, Sheets & Co., Bellaire, Ohio," but without the knowledge or consent of the defendants, the maker altered the place of payment to "National Bank of West Virginia, at Wheeling," and the plaintiff *bona fide* discounted it for him. At maturity it was renewed and the original was surrendered, and when that renewal note fell due, it was surrendered, and the note in suit was given. The plaintiff had judgment below.

Holliday & Son, for plaintiffs in error.

Caldwell & Caldwell, for defendant in error.

HAYMOND, J. (Omitting statements of pleadings and facts, and the establishment of the invalidity of the original note as against defendants by reason of the alteration.)

The defendants, Edwards and Lockwood, in the case before us, in their special plea, aver that said note, after its alteration as aforesaid, was discounted to and at plaintiff's bank, at the instance and by the procurement of said Bell, the maker thereof, who received the proceeds of the same. This allegation admits and declares in substance and effect, that said alteration of the note was made by said Bell, the maker, or with his knowledge and consent, and that before delivery thereof to the plaintiff and before the same was discounted by the plaintiff, and that said Bell, the maker, delivered said note to the plaintiff, as it then appeared and as altered, as a genuine note, and received from the plaintiff the proceeds of said note, so discounted by plaintiff. Taking the allegation of the plea as true in this respect, under the authorities I have cited, and on principle, Bell, the maker, was liable to be sued upon said altered note by the plaintiff after its maturity; and upon the state of facts alleged in the plea, the plaintiff would under the law have been entitled to recover the amount

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of said altered note from said Bell. Of this it appears to me there can be no question.

This suit, as we have seen, is founded upon the note of February 4, 1876, and the defendants, Edwards and Lockwood, aver in their said special plea, that the said last-named note and the note of October 1, 1875, were renewals of the said note of May 28, 1875, which was then indorsed by them, payable at the banking house of Hoge, Sheets & Co., in Bellaire, in the State of Ohio; and that they, at the time of the indorsement of the two last notes, had no knowledge of any kind of alteration of said note of May 28, 1875, nor had they any such knowledge until after the commencement of this suit; that no new consideration ever was received by them, or either of them, from plaintiff or any person, for said two renewed notes.

It seems to me, after an examination of a number of cases and general authorities bearing on the subject, that said special plea is insufficient in substance and law; and that the said Municipal Court did not err in sustaining the plaintiff's demurrer to said special plea.

"By the rules of the common law no promise, which is not made for a consideration, can be enforced. This consideration may be either a gain or benefit of any kind to him, who makes the promise, or a loss or injury of any kind, suffered by him, to whom it is made; such gain being the cause of, or inducement to, the promise, and the promise being the cause of, or the inducement to, such loss." Pars. on Notes and Bills, § 1, 175. In the case of negotiable bills and notes generally, a consideration is presumed between the immediate parties thereto; but this presumption may be rebutted by evidence; and proof that there was no consideration in fact, will constitute a perfect defense. But as to subsequent *bona fide* holders for value this presumption of consideration is conclusive. As to them it is immaterial whether there was any consideration between prior parties or not. "Therefore a maker cannot defend himself, on the ground that he promised without consideration, against the suit of an indorsee; nor can an indorser against the suit of the indorsee of his indorsee. But a maker sued by the payee, or an indorser by his indorsee, or in general any promisor, sued by the party to whom he directly promises, may make this defense." Pars. Notes and Bills, 175, 176; 1 Dan. Neg. Inst. 126, 127, 128, 129, 130, 135, and cases there cited; Story on Promissory Notes (5th ed.), 210.

A defendant may, in general, make the defense of a want of consideration against a remote party, if he could have made it against

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a nearer party, and the nearest party took the paper from the nearer party with a knowledge that it was open to this defense. But a very important exception to this rule prevails in the case of accommodation paper. The plain reason of this is, that the accommodation maker, acceptor or indorser intends to lend his credit, and does it as a favor to some party who pays him nothing. This party therefore can never sue him; or if he does, the want of consideration will be a perfect defense. But if this accommodated party uses the credit he has borrowed by selling the note or getting it discounted, the holder may say: "I bought the note, or discounted it, for the very reason that I knew you had lent your credit on it; and I took it on the faith of your credit." We must therefore understand the legal definition of an accommodation party to negotiable paper to be one who puts his name there without any consideration, with the intention of lending his credit to the accommodated party." 1 Pars. on Bills and Notes, 183, 184; Story on Prom. Notes (5th ed.), 1, 217, 218; Dan. Neg. Inst. 148, 149, 150.

We have seen, however, that when said altered note matured the plaintiff had a right of action against the maker of the note at bar; and the two notes given in renewal thereof, as alleged in said plea, each operated at least a suspension of the debt evidenced by the original, and of the right to sue the maker thereof therefor, until the maturity and dishonor of such renewal note. 2 Dan. Neg. Inst. 259, 260, 264, and authorities there cited.

As soon as the note or bill given in renewal is dishonored, the original debt revives; and the creditor may pursue his remedy for it or sue upon the bill or note. The bill or note, taken in conditional payment, became by its dishonor a collateral security, which the creditor may retain, and endeavor to collect, without forfeiting the right to proceed in the principal cause of action, subject to the obligation of surrendering up the bill or note at the trial. 2 Dan. Neg. Inst. 264; *Lazier v. Nevin*, 3 W. Va. 622, 627, 628.

The said special plea substantially shows that the plaintiff gave a consideration, deemed valuable in law, for the note given in renewal of the original altered note. By accepting the note given in renewal it gave extension of time at least to the maker of the original note, which time was until the maturity and dishonor of the note given in renewal. Or in other words, the plaintiff, by receiving said renewal note for a valuable consideration, agreed to forbear to sue the maker of the original note, as well as any of the indorsers,

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as to whom the original altered note was valid and binding; and the plea fails to allege that the alteration alleged was made without the knowledge or consent of the maker or of any of the indorsers, except Edwards and Lockwood.

An agreement to forbear for a time proceedings at law or in equity, to enforce a well-founded claim is a valid consideration for a promise. But this consideration fails, if it be shown that the claim is wholly and certainly unsustainable at law or equity. "It is not material that the party who makes the promise, in consideration of such forbearance, should have a direct interest in the suit to be forborne, or be directly benefited by the delay. It is enough that he requests such forbearance, for the benefit of the defendant will be supposed to extend to him; and it would also be enough to make the consideration valid, that the creditor is injured by the delay. But there must have been some party who could have been sued. And in cases in which the person to be forborne is not mentioned, but the forbearance may be understood to be forbearance of whoever might be sued, the promise founded on such consideration is binding, if there be any person liable to suit, though the defendant himself is not liable. In general, the waiver of any legal right, at the request of another party, is a sufficient consideration for a promise or the waiver of any equitable right." 1 Para. Con. (5th ed.) 440, 443, 444, and cases there cited; id (2d ed.), 366, 367, 368, 369, and cases there cited in notes; 2 Dan. Neg. Inst. 147; Para. Notes and Bills, 198, 199.

Any damage to another, or suspension or forbearance of his right, is a foundation for an undertaking and will make it binding, though no actual benefit accrue to the party undertaking. 3 Burr. 1673, and the opinion of Lord ELLENBOROUGH and the other judges in the case of *Jones v. Ashbarnham*, 4 East, 455, 463, 464, 465, 466. "Forbearance is not a good consideration for a promise, where there is no debt in existence; but if one be liable for a debt, general promises by several, in consideration of forbearance, are good and will bind all. When there has been a contract with the principal for delay, upon which the surety might claim his discharge, if the principal and surety subsequently agree upon a general contract to forbear the collection of the debt for a certain period, such contract, in the absence of fraud, is upon good consideration, the principal being liable, and will bind the surety as well as the principal." *New Hampshire Savings Bank v. Coleved*, 15 N. H. 119. "When a party

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is in possession of a negotiable instrument, the presumption is that he holds it for value, and the burden of proof is upon him who disputes it, an exception being when the defect appears on the face of the instrument. *Goodman v. Simonds*, 20 How. 343.

In the last-named case at pages 370 and 371, Justice CLIFFORD says: "When the settlement was made, the new notes were given in payment of the prior indebtedness, and the collaterals previously held were surrendered to the defendant, and the time of payment was extended and definitely fixed by the terms of the notes, showing an agreement to give time for the payment of a debt already overdue, and a forbearance to enforce remedies for its recovery; and the implication is very strong, that the delay secured by the arrangement constituted the principal inducement to the transfer of the bill. Such a suspension of an existing demand is frequently of the utmost importance to a debtor; and it constitutes one of the oldest titles of the law under the head of forbearance, and has always been considered a sufficient valid consideration. *Elting v. Vanderlyn*, 4 Johns. 237; *Morton v. Burn*, 7 Ad. & E. 19; *Baker v. Walker*, 14 M. & W. 465; *Jennison v. Stafford*, 1 Cush. 168; *Walton v. Mascell*, 13 M. & W. 453; Com. Dig., action Assumpsit, B. 1; *Wheeler v. Slocum*, 16 Pick. 52; Story on Prom. Notes, § 186, and cases cited. The surrender of other instruments, although held as collateral security, is also a good consideration; and this, as well as the former proposition, is now generally admitted, and is not open to dispute. *Depeau v. Waddington*, 6 Whar. 220; *Hornblower v. Proud*, 2 B. & A. 327; *Ridout v. Bristow*, 1 Crompt. & J. 231; *Bank of Salina v. Babcock*, 21 Wend. 499; *Young v. Lee*, 2 Ker. 551."

Taking the allegations of said special plea to be true, as therein pleaded, it seems to me, that the plaintiff under the allegations of said plea must be considered and held to be a *bona fide* holder, for valuable consideration, of the promissory note sued upon; and that the matters of defense, pleaded in bar of the plaintiff's right to recover, as pleaded, are not sufficient in law, if true, to bar the plaintiff's right of recovery upon the promissory note, sued upon and in the declaration mentioned.

The Municipal Court of Wheeling therefore did not err in sustaining the plaintiff's demurrer to said special plea.

In 1 Par. Notes and Bills at pages 201, 202, he says: "A note given by a party in satisfaction of a liability, from which he was discharged in ignorance of the facts which constituted such discharge, cannot be

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enforced against him, though he may have had the means of knowing these facts;" and he cites in note (r), on page 202, *Bell v. Gardner*, 4 Man. & G. 11; *Bullock v. Ogburn*, 13 Ala. 346; *Mercer v. Clark*, 3 Bibb, 224.

The case of *Bell v. Gardner* was an action by the payee against the maker of a promissory note; and in that case it was held, as stated in the syllabus, that "A negotiable security, given by a party in satisfaction of a liability, from which he was discharged in law, in ignorance of the facts which constituted such discharge, cannot be enforced against him, though he may have had the *means* of knowing these facts. Therefore, when a bill of exchange, endorsed by A for the accommodation of the drawer, was afterwards altered in a material point, with the consent of the drawer, and when the bill was at maturity, B, the then holder, made a demand upon A, who ignorant of the alteration, though he had ample means of knowing it, gave B a promissory note for the amount of the bill and expenses; held that it was a good defense to the action of the note by B, that at the time A gave it, he was not in fact aware of the alteration of the bill.

The case of *Mercer v. Clark*, 3 Bibb, was also an action by the payee against the maker of the note. The case cited in 13 Ala., I cannot now see, as the book is not before me, and is not in the State library; but my recollection, though not distinct, is, that the case therein cited is also an action by the payee against the maker of the note.

It seems to be "a general principle of the law merchant, that as between the immediate parties to a negotiable instrument, parties between whom there is a privity, the consideration may be inquired into; and that as to them, the only superiority of a bill or note over other unsealed evidence of debt is, that it *prima facie* imports a consideration." 1 Dan. Neg. Inst. 576, § 769. "The same rule which admits inquiry into the consideration of negotiable paper between the original payer and payee, extends to admit such inquiry in any suit between parties, between whom there is privity. That is to say, between the immediate parties to any contract evidenced by the drawing, accepting, making or indorsing a bill or note, it may be shown that there was no consideration, or that the consideration has failed, or a set-off may be pleaded; but as to other parties *remote* to each other none of these defenses are admissible." *Id.*, vol. 1 135, § 174.

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It is said, by Mr. Daniel, in the first volume of his work at page 163: "If the consideration of the original bill or note be illegal, a renewal of it will be open to the same objection and defense; and if the original instrument was obtained by fraud, a renewal of it by the original parties, without knowledge of the fraud, would stand upon the same footing. And he cites *Sawyer v. Wisnell*, 9 Allen, 39; *Holden v. Cosgrove*, 12 Gray, 216; *Scudder v. Thomas*, 35 Ga. 364.

These cases, and the principles therein decided, I do not think affect or oppose the conclusion to which I have arrived, as to the sufficiency of said plea.

[Omitting considerations of pleading and other minor matters.]

All concur.

Judgment affirmed.

BALTIMORE and OHIO RAILROAD CO. v. JAMESON.

(12 W. Va. 833.)

Set-off and recoupment — bond of indemnity — obligor's services.

In an action on a bond for the faithful and honest discharge of the obligor's duty as agent, the defendant may set off his services as such agent.

ACTION on a bond with the following condition:

"Whereas, Jacob S. Jameson hath been appointed by said company as agent at Duffields, on the Baltimore and Ohio railroad: Now, the condition of this obligation is such, that if the said Jacob S. Jameson do not at all times hereafter, so long as he shall hold said office, well and faithfully perform the duties of the said office, so that said company shall suffer no loss, damage or injury on account of any act or acts, either of omission or commission, of the said Jacob S. Jameson, and without wasting, embezzling, spending, misapplying or unlawfully making way with the money, property or effects of the said company, or such as may come into his hands or under his control, while temporarily employed in any manner in the service of said company, while holding the office aforesaid, then if the said Jacob S. Jameson, or W. T. Jameson, or either of them, or their or either of their heirs, executors or administrators, shall make due and sufficient recompense unto the said company for such loss, damage or

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injury, wasting, embezzling, spending, misapplying or unlawfully making way with, then this obligation to be void, else to be in full force."

Plea of conditions performed and set-off for services as such agent. Demurrer to the plea of set-off was sustained, and the plaintiff had judgment.

Daniel B. Lucas, for plaintiff in error.

George Baylor, for defendant in error.

GREEN, President. The principal point involved in this case is: Did the court err in sustaining the demurrer to the plea of set-off? The plea of set-off is a creation of statute law. At common law, a defendant was in no case allowed to recover a judgment for damages for a positive claim against the plaintiff. At common law, when there were mutual cross-demands, unconnected with each other, arising upon contract, express or implied, though the demands of each party were liquidated, or capable of being ascertained by simple calculation, they could not be settled in one suit; but the defendant in such case was compelled to resort to a cross-action. To avoid a multiplicity of suits in such cases the statutes of set-off were enacted.

But at common law, the defendant had a right to reduce the plaintiff's damages in a few instances, when the reduction claimed sprang immediately from the claim relied on by the plaintiff. This was denominated a *recoupment*. This right was anciently confined within very narrow limits, and was indeed little, if anything, more than a mere right of deduction from the amount of the plaintiff's recovery, on the ground that his damages were really not as high as alleged. This remedy of *recoupment* was of such limited application, and so trameled originally by technicalities, that it was of but little use, and the term *recoupment* for a time became obsolete. Yet the principle was always retained.

Recently not only has the term *recoupment* been revived, but the doctrine has sprung into new life. The rigid rules of the common law, which so restricted this right, have yielded to the advance of civilization, and a new vigor has been infused into this remedy; and it is now held that the defendant may *recoup* generally, whenever the demands of both parties spring out of the same contract or transaction; and it opens in this country, generally, the entire con-

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tract or transaction, so far as is necessary to determine the plaintiff's right to damages, and the amount of the defendant's cross-claims.

This defense of *recoupment* differs from set-off in several important particulars. First, it is confined to matters arising out of, and connected with, the transaction or contract upon which the suit was brought; secondly, it has no regard to whether the claim be liquidated or unliquidated; thirdly, if the defendant's claim exceeds the plaintiff's, he cannot in that action recover the balance due to him. See *Ward v. Fellers*, 3 Mich. 281.

While the right of *recoupment* has been much extended in modern times, the instances and extent to which it may be exercised by the defendant, are to a very considerable degree unsettled. In some of the States, it has been very much extended, while in other States and in England it is confined within much narrower limits.

The law in reference to *recoupment* in this State and Virginia remains to be settled. It is important that it should, when settled, be carefully considered. It is, as we shall presently see, unnecessary to consider it in this case, as the claim of the defendant in this case should have been permitted to have gone to the jury under his plea of set-off. The authorities, necessary to be examined in determining the true limits of *recoupment* in this State are not now accessible to this court, and therefore it is considered better to say nothing about its limits, as the determination of the question, whether the defendant's claim could be *recouped* in this case, is unnecessary.

The defendant's claim in this case is, in my judgment, a proper set-off to the plaintiff's demand, and should have been permitted by the court to have gone to the jury, as such. The right of *recoupment* being formerly so very limited gave rise to the necessity of the enactment by statute of the defense of set-off. The oldest statutes of set-off are those passed by the legislature of Virginia.

The first statute of this character was passed in February, 1645, amended the next year, and still further changed by acts passed in 1658 and March, 1662. See Hen. Stat., vol. 1, 296; vol. 1, 314; vol. 1, 449; vol. 2, 110. By the last of these acts, which did not materially change the case, in which set-off could be filed under the former statutes, it was provided, when a suit should be commenced for a debt, if the defendant have a bill, bond or account of the plaintiff, such debt of the plaintiff shall be discounted out of the debt he claimeth of the defendant. See Rob. Prac., vol. 5, 958, note.

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injury, wasting, embezzling, spending, misapplying or unlawfully making way with, then this obligation to be void, else to be in full force."

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George Baylor, for defendant in error.

GREEN, President. The principal point involved in this case is: Did the court err in sustaining the demurrer to the plea of set-off? The plea of set-off is a creation of statute law. At common law, a defendant was in no case allowed to recover a judgment for damages for a positive claim against the plaintiff. At common law, when there were mutual cross-demands, unconnected with each other, arising upon contract, express or implied, though the demands of each party were liquidated, or capable of being ascertained by simple calculation, they could not be settled in one suit; but the defendant in such case was compelled to resort to a cross-action. To avoid a multiplicity of suits in such cases the statutes of set-off were enacted.

But at common law, the defendant had a right to reduce the plaintiff's damages in a few instances, when the reduction claimed sprang immediately from the claim relied on by the plaintiff. This was denominated a *recoupment*. This right was anciently confined within very narrow limits, and was indeed little, if anything, more than a mere right of deduction from the amount of the plaintiff's recovery, on the ground that his damages were really not as high as alleged. This remedy of *recoupment* was of such limited application, and so trameled originally by technicalities, that it was of but little use, and the term *recoupment* for a time became obsolete. Yet the principle was always retained.

Recently not only has the term *recoupment* been revived, but the doctrine has sprung into new life. The rigid rules of the common law, which so restricted this right, have yielded to the advance of civilization, and a new vigor has been infused into this remedy; and it is now held that the defendant may *recoup* generally, whenever the demands of both parties spring out of the same contract or transaction; and it opens in this country, generally, the entire con-

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the courts of Virginia, and in this country generally, to construe more liberally than the English courts their statutes of set-off.

Thus, according to the English decisions, a set-off is not a good defense to an avowry for rent in an action of replevin, because replevin was regarded in this respect an action *ex delicto*, as it certainly is in form, and so was not within the terms of the English statute, which allows set-off, when there are mutual *debts*. Nor does it fall any more within the words of our statute, which allows set-off "in a suit for any debt." Nevertheless the Virginia courts, construing the statute of set-off more liberally, regarded the action of replevin, after the defendant's avowry for rent; as in substance an action of debt by the defendant against the plaintiff for rent, and therefore as coming within the true intent and meaning of our statute of set-off.

The statutes of set-off in the different States differ so much, that it is difficult to deduce from their decisions any general rule as to the cases in which set-off may be pleaded. Generally, but by no means universally, sets-off are by these statutes confined expressly, or by fair implication, to debts; and the decisions of the courts in the different States generally require, that the demand of both the plaintiff and defendant must both be certain, or capable of being reduced to certainty by calculation, or computation: that is, these demands must be in the nature of liquidated damages, and not in the nature of unliquidated damages. If these demands are in the nature of debts, as thus explained, it has generally been held immaterial, what may be the form of the action. The substance only of the demands of the plaintiff and of the defendant is to be considered, in deciding whether a set-off is a defense in any particular case.

This we have seen is especially the case in this State and in Virginia. The defense of set-off being allowed in the action of replevin, when the defendant avows for rent though the form of the action is for a tort. Our statute says, that "in a suit for any debt a set-off may be allowed;" and according to our decisions it matters not what the form of the suit or proceeding may be; if it is in substance for the recovery of a debt, set-off should be allowed. Our statute in no manner defines the nature of the defendant's demand which may be set off against such a demand of the plaintiff. But the English and generally the American cases agree that the defendant's demand to be set off must be of the same general character as the plaintiff's demand. And as by our law the plaintiff's demand must in its nature

be substantially a debt, so the defendant's demand must be also substantially a debt.

In the case before us for consideration the plaintiff's demand is substantially a debt. It is nominally an action of debt for the recovery of the penalty named in a bond. But in a suit on a penal bond the substantial cause of action is the breach of the agreement, contained in the condition. *Sangster v. Commonwealth*, 17 Gratt. 136. What then is the breach of the agreement, which is complained of substantially by the plaintiff in this case? The agreement, complained of as broken, is that the plaintiff should suffer no loss by the defendant's making way with any money, which may come into his hands, while in the employment of the plaintiff as its agent. And the declaration alleges substantially, that in violation of this agreement the defendant did make way with \$395 of the plaintiff's money so received by him. Now it is obvious, that this \$395 in money, received by the defendant for the plaintiff and not accounted for, was in its nature clearly a debt, a demand not only capable of being rendered certain by computation, but a sum absolutely fixed and certain.

It is true, the form in which this breach is laid in the declaration, is that the defendant did not compensate the plaintiff for the loss, sustained by the defendant's making way with this \$395, received by him for the plaintiff. But as the precise sum thus made way with by the defendant would compensate the plaintiff for its loss, and it would necessarily recover neither more nor less than this sum, the breach thus laid is obviously the same in substance as though the breach had been the non-payment of this sum. The form even of the action, we have seen, is totally immaterial, when we are deciding whether a defense of set-off can be made, and *a fortiori* the form in which the breach is laid, must, in determining whether set-off can be pleaded, be entirely immaterial.

It remains, then, to consider whether the set-off, pleaded by the defendant in this case was a debt. This set-off was \$1,200, due from the plaintiff to the defendant for services, rendered at their request as their agent. This was obviously a debt for which the defendant could have sued the plaintiff in an action of *indebitatus assumpsit*, or debt. The usual form of action to recover such a demand would be *indebitatus assumpsit*. See Chit. Plead., vol. 1, p. 348; and the form for the recovery for such services in *indebitatus assumpsit*, given in 2 Chit. Plead. 78.

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But debt for such services could be brought in the form of an *indebitatus* count in debt for services rendered, and a form of such a declaration may be found in Chit. Plead. vol. 2, p. 385. The demand of the defendant is therefore in this case obviously the proper subject for set-off.

It is contended by appellee's counsel, that the plaintiff's claim is for unliquidated damages, and that therefore the defense of set-off is not admissible. It is true, as contended by him, that the real cause of action is the breach of the agreement, and not the penalty of the bond. But in this case the breach of the agreement, which is the real cause of action, is substantially, as we have seen, the non-payment of a debt. If the condition of the bond had been to build a house, or perform any other act, the mere non-performance of which could be only compensated by the payment of damages, for the exact ascertainment of which neither the parties nor the law has fixed any criterions, the plaintiff's claim would have been substantially for unliquidated damages. *Smith v. Warner*, 14 Mich. 152; *Castilli v. Boddington*, 1 Ell. & B. 72, 68, 879; *Elling v. Scott*, 2 Johns. 157; *Christian v. Miller*, 3 Leigh. 83.

Thus in *Harrison v. Wortham*, 8 Leigh. 304, the claim was an order on a third party in favor of the plaintiffs, payable at sight, which *when collected* was to be placed to the defendant's credit. The court held, that as the plaintiff's liability was not necessarily to the amount of this order, but for such damages as a jury might assess, and as the damages were wholly uncertain, and might range from mere nominal damages to the entire amount of the order, this claim would not be allowed as a set-off, it being for unliquidated damages. Had the law fixed a criterion for the ascertainment of these damages exactly, it would have been obviously held otherwise.

In the case before us the extent of the defendant's liability for the breach of the agreement, alleged in the declaration, is definitely fixed by law. It is the amount of money, received by the defendant for the plaintiff as its agent and unaccounted for by him. According to the views of a majority of the court in *Allison v. Bank*, 6 Rand. 226, the plaintiff in this form of action need not have set forth either the names of the persons, or the exact time, when the defendant received the several sums of money not accounted for, nor the amount so received by him, with the particularity he might have been required to do, had the suit been a direct action of debt to recover the sums received, instead of an action on a penal bond.

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But the form of the action itself, as we have seen, much less the mere form of the declaration, cannot be material in determining the question, whether the demand is substantially for liquidated or for unliquidated damages, and therefore whether open to the defense of set-off or not.

In the case of *Tuckie v. Bushley*, 13 C. B. (76 Eng. Com. Law R. 864), relied on by appellee's counsel, the declaration was for unliquidated damages on a policy of insurance alleging a partial loss. The defendant pleaded that there had been an adjustment, and to the amount of this adjustment, alleged in the plea, the plea further claimed certain set-off; and it was held on demurrer that the plea was bad. The court in its opinion assigns as the reason of its decision, "it may be that if the adjustment was an absolute and definite arrangement from which neither party could recede, it would be one against which a set-off might be pleaded, although the action was in point of form an action for unliquidated damages. But upon that it is unnecessary for us to express an opinion; for we think, the adjustment has not the effect of ascertaining and rendering liquidated the amount of the plaintiff's claim, so as to dispense with the intervention of a jury. It is not an absolute and final settlement, which is to be binding on the parties. It may or may not, though generally it will be binding and conclusive on the jury and on the parties as to the amount." The decision was obviously based on the ground that the adjustment did not in law fix a criterion for ascertaining accurately the damages. The assumption in this case that an adjustment is not an absolute and final settlement is in apparent conflict with the decision of this court in *Stolle v. Aetna Fire and Marine Insurance Co.*, 10 W. Va. 546, where it was held that a general *insimul computassent* count is sustained by proof of an adjustment. If this be law, and the adjustment be final, set-off could be here pleaded; and this English case would not be held to be law here if a similar case was presented to this court. The case before us is, however, by no means similar, and in considering the weight to which it is entitled it should also be borne in mind that the Virginia Court of Appeals, under our statute of set-off, has been more liberal in allowing the plea of set-off than the English courts, in part from the different wording of our statute of set-off from theirs, but principally because our statute of set-off has been more liberally construed, with a view to the furtherance of its obvious policy, which is to prevent multiplicity of suits, and as far as conveniently can be

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done, to effectuate in one action complete justice between the parties." See *Allen v. Harte*, 18 Gratt. 722; *Wartman v. Yost*, 22 id. 605; *Tuberville v. Self*, 2 Wash. 71; 4 Call, 580; *Nicholson v. Hancock*, 4 Hen. & Munf. 491; *Murray v. Pennington*, 3 Gratt. 91.

The case of *Tuckie v. Bushley*, 76 Eng. Com. Law, 864, might be readily distinguishable from the case now before us; but if it could not, it is one which would, from the general spirit of our decisions, be probably not followed in this State.

The weight of the authorities in the United States is in favor of holding, in such a case as the one before us, that the plaintiff's claim is for liquidated damages, and may be met by the defense of set-off. See *Austin v. Feland*, 8 Mo. 310; *Caldwell v. Drake*, 4 J. J. Mar. 246; *Ragsdale v. Buford*, 3 Hayw. R. 195. These cases lay down the law that whenever *indebitatus assumpsit* would lie, whatever be the form of the action, set-off may be pleaded; and if unliquidated damages are to be assessed at the discretion of the jury, set-off cannot be pleaded; but it may be pleaded, though in one sense the damages might be called unliquidated, that is if based on pecuniary demands, as for goods sold, services rendered, money had and received, or any other cause where *indebitatus assumpsit* would lie.

Nor does the fact that the plaintiff's demand is secured by a penal bond, and the suit is brought on the bond, affect the defendant's right to plead set-off, if the plaintiff's claim is such that but for its being secured by the penal bond, he could have brought an action of *indebitatus assumpsit* on it. *Burgess v. Tucker*, 5 Johns. 107.

The case of *Concord v. Pillsbury*, 33 N. H. 311, strongly resembles the case before us. It was an action of debt on a penal bond conditioned for the faithful performance of the duties of the office of city marshal, among which duties was that of collecting and paying over to the city treasurer all taxes collected. The defendant pleaded set-off of services performed and expenses incurred for the city, and it was held that such defense ought to have been received.

I am therefore of opinion that the court erred in sustaining the plaintiff's demurrer in this case to the defendant's plea of set-off. It is unnecessary to consider the other error assigned; the refusal of the court to permit the defendant, under the plea of condition performed, to prove his demand for services rendered as a *recoupment*. This point, and whether notice of the defendant's purpose of relying on it, as a *recoupment*, ought not to have been given; and whether the filing of his account with the plea of set-off was suffi-

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cient notice, were all slightly argued at the bar ; but as the questions involved in this assignment of error are new in this State, and the authorities on the subject not now accessible to us, I deem it best to express no opinion on these questions.

The judgment of the Circuit Court must be reversed and annulled; and the appellant must recover of the appellee his costs in this court expended; and this court, proceeding to render such judgment as the Circuit Court ought to have rendered, doth overrule the plaintiff's demurrer to the defendant's plea of set-off; and doth remand the cause to the Circuit Court of Jefferson, to be there proceeded with in accordance with the principles laid down in this opinion, and further according to law.

Judges HAYMOND and JOHNSON concurred.

Judgment reversed and cause remanded.

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ABATEMENT.

1. **Action by husband for injury to wife.]** An action by a husband against a carrier of passengers for loss of services of his wife and expenses in consequence of injuries to her person, resulting from the defendant's negligence, is grounded in tort, but survives as an action for a wrong to the "property, rights or interests of another," within the statute. *Cregin v. Brooklyn Crosstown Railroad Co.* (N. Y.), 459.
2. **Action by woman for fraudulently inducing her to marry.]** An action of damages for fraud of the defendant in inducing the plaintiff to marry and cohabit with him, by means of false and fraudulent representations that his first wife was dead, is for injury to the person, and does not survive. *Price v. Price* (N. Y.), 463.

ABORTION.

See CRIMINAL LAW, 148.

ACCIDENT.

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ACCOMPLICE.

See WITNESS, 518.

ACCORD AND SATISFACTION.

- Part execution and tender of residue.]** An accord must be completely executed to sustain a plea of accord and satisfaction ; part execution and tender of performance of the residue is insufficient. *Kromer v Heim* (N. Y.), 491.

ACCRETION.

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ACTION.

1. **By administrator.]** An administrator has no right of action for injury to the land of his intestate. *Taylor v. Fickas* (Ind.), 114.
2. **Liability of stockholder — how enforced.]** Where a statute creating a corporation provides that each stockholder shall be liable to double the amount of his stock, his liability is enforceable at law, and each stockholder is severally liable to any creditor. *McCarthy v. Lavasche* (Ill.), 83.

ACTION — *Continued.*

By wife against husband on note executed during coverture.] *See* MARRIAGE, 399.

To recover goods sold on Sunday.] *See* SUNDAY, 357.

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See ABATEMENT, 459, 463; PARTITION, 90.

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See ACTION, 114.

AGENCY.

Sale of intoxicating liquors by agent contrary to orders of principal — intent — ignorance of fact.] A statute prescribed a penalty for selling intoxicating liquors to any person in the habit of becoming intoxicated. The defendant instructed his servant not to sell liquors to any such person, but the servant disobeyed the direction, without the defendant's knowledge. *Held*, that the defendant was liable, and it was immaterial that he did not know that the purchaser was in the habit of becoming intoxicated. *Dudley v. Sautbire* (Iowa), 165.

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See CONTRACT.

ALTERATION.

See NEGOTIABLE INSTRUMENT, 394, 703.

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See MUNICIPAL CORPORATION, 816.

ANNUITY.

See WILL, 612.

ARREST AND BAIL.

Bail on Sunday.] An undertaking of bail for murder, entered into on Sunday during vacation, is a case of necessity and valid. *Hammons v. State* (Ala.), 13.

ASSAULT.

With intent to kill.] *See* CRIMINAL LAW, 1, 257.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. Authority to sell on credit.] An assignment for the benefit of creditors authorizing the assignee to "sell and dispose of the property and generally convert the same into money, upon such terms and conditions as in his judgment may appear just and for the interest of all parties interested," is not void upon its face. *Brahmstadt v. McWhirter* (Neb.), 396.

ASSIGNMENT FOR BENEFIT OF CREDITORS — Continued.

2. **By corporation to insolvent stockholder.]** An insolvent corporation may make an assignment for the benefit of its creditors to one of its stockholders, who is insolvent, and who was the former treasurer, provided it is done in good faith; and evidence of the motives of the directors on that subject is admissible. *Covert v. Rogers* (Mich.), 819.

ASSIGNMENT.

Of dower.] See DOWER, 268.

ATTACHMENT.

Of property of non-resident, without security.] See CONSTITUTIONAL LAW, 406.

ATTORNEY AND CLIENT.

1. **Agreement for compensation — constructive fraud.]** An agreement between attorney and client, for the attorney's compensation for services rendered and to be rendered, will be jealously scrutinized, and will not be supported without clear proof on the part of the attorney that it is fair and reasonable. *Dickinson v. Bradford* (Ala.), 23.
2. **Contract — lobby services.]** The contract of an attorney for services as such before a department of government or a legislative body is valid, but for lobby services is void, and where it is for both, the entire contract is vitiated. *McBratney v. Chandler* (Kans.), 213.

BAILMENT.

1. **Hirer of horse becoming sick — liability of owner for expense of care.** One who hires a horse is not liable for the expense of caring for it if it becomes sick in his hands without his fault, but the owner is liable therefor to a third person, who, with his knowledge, cares for it at the request of the hirer. *Leach v. French* (Me.), 296.
2. **Lien for repairs imposed by bailee.]** The bailee of personal property can impose no lien for repairs on the property bailed, as against the owner, without his knowledge and consent. *Small v. Robinson* (Me.), 299.

See OFFICE AND OFFICER, 284.

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See JUDGMENT, 74.

BETTING AND GAMING.

Action to recover stake after notice not to pay.] Money held by a stakeholder on a bet may be recovered by the depositor, provided he notifies him before delivery of the stakes not to pay it over. *Gilmere v. Woodcock* (Me.), 255.

BILL.

In equity, to recover usury.] See NATIONAL BANK, 629.

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See PARTNERSHIP, 488.

Set-off and recoupment on action on.] *See* SET-OFF, 775.

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See LANDLORD AND TENANT, 91.

BURGLARY.

See CRIMINAL LAW, 690.

CARRIER.

1. **Inevitable accident — perishable property — sale thereof by carrier.]**
Peaches were delivered to a common carrier, at Fort Ancient, Ohio, on the eleventh and twelfth of the month, for transportation to New York city. The carrier shipped them by the New York Central railroad. On the evening of the twelfth, a bridge, near Utica, on that railroad, was carried away by an extraordinary freshet; and when the peaches arrived there, it was found impossible to get them across, and as they showed signs of decay, the carrier sold them for the best attainable price for the benefit of the owner. *Held*, (1) that the carrier was not liable for the loss, as it was owing to the inherent qualities of the freight; (2) it was not bound to seek another route; (3) it was justified in selling the property. *American Express Company v. Smith* (Ohio), 561.
2. **Liability of last of a connecting line of carriers for negligence of a prior.]**
The last of several common carriers, forming a connecting line, cannot be held for the negligent loss of goods by a prior carrier of the same line. *Lowenburg v. Jones* (Miss.), 379.
3. **Limitation of liability — provision for adjustment of claim for damage.]**
A stipulation in a bill of lading given by a common carrier, that in case any claim for damage should arise for the loss of articles mentioned in the receipt while *in transit* or before delivery, the extent of such damage or loss shall be adjusted before removal from the station, and claim therefor made in thirty days to a "trace agent" of the carrier, is an unreasonable provision which the courts will not uphold. *Capehart v. Seaboard and Roanoke Railroad Company* (N. C.), 505.
4. **Negligence.]** A common carrier cannot, by contract, evade his liability for his own negligence, nor limit it to injuries caused by his gross negligence. *Shriver v. Sioux City and St. Paul Railroad Company* (Minn.), 853.
5. **Burden of proof.]** Where goods, specially accepted by a common carrier for transportation, are lost or injured, the burden of proof is for the carrier to show that the loss or injury was within the terms of the exception, and that he was not negligent. *Id.*
6. **Presumption in case of connecting line.]** Where goods pass over a line of several carriers, and are injured in transit, the jury, in the absence of direct proof to the contrary, may presume that they reached the last carrier in the same condition as when delivered to the first. *Id.*

CARRIER — *Continued.*

7. Of passengers — responsibility for manufacturer's negligence in construction of vehicle.] If a carrier of passengers purchases his vehicles from reputable manufacturers, giving them such examination as is practicable and usual among prudent carriers using similar vehicles, he is not responsible for defects not discoverable on such examination, although they might have been discovered in the manufacturing. *Grand Rapids and Indiana Railroad Company v. Huntley* (Mich.), 821.

CHATTEL MORTGAGE.

1. Retention of possession by mortgagor — fraud.] Under the statutes of Kansas a chattel mortgage may contain a valid stipulation for the retention of possession by the mortgagor of the mortgaged property; and possession so retained is not, when the mortgage is duly filed, either *per se* or *prima facie* fraudulent as against creditors or subsequent purchasers. *Frankhouser v. Ellett* (Kans.), 171.
2. —.] Where a mortgage is given on a stock of goods, with a stipulation for possession by the mortgagor, and by agreement outside the mortgage the mortgagor is permitted to continue disposing of the goods in the ordinary course of business, and to use a portion of the proceeds thereof in the support of his family, paying the remainder over in discharge of the mortgage debt, the whole transaction is not thereby, as matter of law, rendered fraudulent and void as against creditors and subsequent purchasers, but will be upheld or condemned according as the arrangement is entered into and carried out in good faith or not. *Id.*

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Larceny of.] *See* CRIMINAL LAW, 59.

CIVIL DAMAGE ACT.

Death of intoxicated person — damages.] In an action under the Civil Damage Act for injury to means of support in consequence of intoxication, a recovery may be had where the intoxication caused the death of the intoxicated person; and in estimating the damages the condition of the family and the estate may be considered, but exemplary damages are not proper. *Reese v. Perkins* (Neb.), 409.

COLLATERALS.

See DEBTOR AND CREDITOR, 688.

COMITY.

See CONSTITUTIONAL LAW, 278.

CONDITION.

See DEED.

CONSIDERATION.

See NEGOTIABLE INSTRUMENT, 682.

CONSPIRACY.

Employees stopping and returning unfinished work.] The eighteen defendants, journeyman tailors, working for the plaintiff by the piece, by conspiracy stopped work simultaneously, and returned their work to the plaintiff unfinished, and worthless in that condition. The plaintiff was unable to get any hands to finish the work. *Held*, that he might maintain an action of damages. *Mapetrick v. Ramge* (Neb.), 415.

CONSTITUTIONAL LAW.

- 1. Act of legislature authorizing opening of an existing judgment.]** An act of the legislature authorizing the opening of an existing judgment is not constitutional. *Ratchiffe v. Anderson* (Gratt.), 716.
- 2. Attachment against non-resident without security.]** A statute authorizing the attachment of the property of a non-resident without an undertaking, is constitutional. *Marsh v. Steele* (Neb.), 406.
- 3. Equality of taxation.]** The law imposing a smaller license tax on proprietors of bars, or drinking saloons, kept on steamboats owned and registered in Louisiana, than on the owners of bars kept on land, does not violate the clause of the Constitution prescribing equality and uniformity of taxation. *State v. Rolle* (La.), 234.
- 4. Equal protection of laws.]** A statute providing that no person shall recover damages from a municipality for an injury from a defect in a highway, unless he resides in a country where similar injuries constitute a like cause of action, is unconstitutional. *Pearson v. City of Portland* (Me.), 276.
- 5. Laborer's lien — overseer not "laborer."]** A farm overseer is not a "laborer" within the constitutional provision giving to mechanics and laborers a lien on the subject of their labor for their compensation. *Whitaker v. Smith* (N. C.), 503.
- 6. Local option as to license of intoxicating liquors.]** A statute authorizing legal voters of a city to determine whether licenses for the sale of intoxicating liquors should be granted, and providing that if such voters should determine against such licensing, the sale of such liquors thereafter should be a misdemeanor, and punishable as therein provided, is valid; and such a determination would revoke all outstanding licenses. *State v. Cooke* (Minn.), 344.
- 7. "Property" subject to taxation — notes, bills, etc.]** The notes, bills, etc., representing money loaned at interest by a corporation, are its "property," and are liable to taxation within the Constitution. *City of New Orleans v. Mechanics and Traders' Insurance Company* (La.), 233.
- 8. Right of municipal corporation to collect wharfage — legislative interference.]** Where a municipal corporation, under the express authority of an act of the legislature, is clothed with the exclusive right to collect wharf-

CONSTITUTIONAL LAW — *Continued.*

age rates from all vessels that shall make use of its wharves, the right is both constitutional and vested, and cannot be abrogated or impaired by any subsequent act of the legislature. *Ellerman v. McMains* (La.), 218.

9. **Waiver of exemption from execution.]** The right to exemption from execution is a personal privilege which the debtor may waive, and such a waiver in a promissory note is binding upon him. *Brown v. Leitch* (Ala.), 42.

10. **Waiver of jury trial in case of misdemeanor.]** Although the Constitution guarantees the right of trial by jury, and provides for speedy trial by jury in prosecutions by indictment, yet it authorizes the legislature to provide for prosecution of misdemeanors before justices of the peace, thereby dispensing with a trial by jury. A statute authorizing a waiver of jury trial in cases of misdemeanor, the prosecution being commenced by indictment and transferred to an inferior court, is therefore constitutional. *Connelly v. State* (Ala.), 34.

CONSTRUCTIVE FRAUD.

See ATTORNEY AND CLIENT, 23.

CONTRACT.

1. **Place of making — indorsement in another State.]** A negotiable note was executed in Illinois, and sent to the payee in Louisiana, who there indorsed it for accommodation and returned it by mail to the maker in Illinois, who negotiated and delivered it in Illinois. *Held*, that the indorsement was an Illinois contract, and regulated by the law of that State. *Gay v. Rainey* (Ill.), 76.

2. **Lex loci — married woman — promissory note.]** A note written and dated in Maine, but signed in Massachusetts by the wife of a citizen of that State, as surety for her husband, and returned by mail to the payee in Maine, is a Maine contract, and is enforceable in Maine although void by the laws of Massachusetts. *Bell v. Packard* (Me.), 251.

3. **Public policy — to induce building of railroad.]** A contract to pay money, in consideration that a railway company will construct its road to a certain point, is valid. *First National Bank of Cedar Rapids v. Hendrie* (Iowa), 153.

4. **Validity — unlawful use of money lent on note.]** Where a bank discounted a note, its officers knowing that the proceeds were to be used for an unlawful purpose, but not intending to aid such purpose, the note is not invalid. *Henderson v. Waggoner* (Lea), 591.

5. **By married woman to support another — gift.]** A married woman agreed in writing to support her mother for life, and the mother, in consideration thereof, assigned to her all her personal effects and agreed to give her at her death a note of \$1,300 against a third person, the mother reserving the interest thereof for her life, but no present assignment of the note was made. *Held*, (1) that there was no gift of the note, nor any trust

CONTRACT — *Continued.*

therein in the mother for the daughter's use ; (2) that the agreement was invalid because it did not relate to the wife's separate property or earnings, nor to her separate trade or business. *Olney v. Howe* (Ill.), 105.

6. For service — what authorizes rescission by employer.] The plaintiff agreed, in writing, to serve the defendant for three years, as superintendent and manager of his manufactory of clothing, and to devote his whole time, attention and skill thereto ; and the defendant agreed to pay him therefor \$3,000 a year, in equal monthly payments. The plaintiff, without fault on his part, was arrested and kept in jail for about a fortnight, during the busiest season, and the defendant hired another person in his place. On being released, the plaintiff tendered his [services, which the defendant refused. He had been paid in full for the time he actually worked. *Held*, that the plaintiff could not maintain an action of damages for breach of the agreement. *Leopold v. Salkey* (Ill.), 98.

7. To pay "outstanding liabilities"—damages for libel.] A stipulation by the vendee of a newspaper to pay "all of the outstanding liabilities" of the paper, will not make the vendee liable for the damages for libel subsequently recovered against the vendor, in a suit pending when the sale of the paper was made. *Perret v. King* (La.), 240.

See ATTORNEY AND CLIENT, 23, 213; INFANCY, 639, 678; MARRIAGE, 623; NEGLIGENCE, 123.

CONTRIBUTION.

See PARTY WALL, 598.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATION.

1. Act of director on behalf of, but for his own profit.] A director of a bank loaned the moneys of the bank on a note running to the bank at a stipulated rate of interest, but on a secret agreement with the borrowers that he should participate in the profits of lands to be purchased with the moneys. *Held*, that he was bound to surrender those acquired profits to the bank. *Farmers and Merchants' Bank v. Downey* (Cal.), 62.
2. Individual liability of stockholders — estoppel.] Persons holding themselves out to the world as stockholders of a corporation, and thus inducing persons to credit the corporation and make deposits on the faith of its valid organization and the individual liability of its stockholders, are estopped from alleging the unconstitutionality of the charter as a means of escaping their individual liability. *McCarthy v. Lavasche* (Ill.), 83.
3. Purchasing its own stock.] A corporation, with power to purchase "property deemed desirable in the transaction of its business," may purchase its own stock. *Iowa Lumber Co. v. Foster* (Iowa), 140.

CORPORATION — *Continued.*

4. **Purchaser of stock by directors ultra vires — liability of directors.]** Where one contracted to sell his stock in a State bank to the bank through the directors, the contract being *ultra vires* as to the bank the directors are not individually liable. *Abeles v. Cochran* (Kans.), 194.

Assignment by, for benefit of creditors, to insolvent stockholder.] See ASSIGNMENT FOR BENEFIT OF CREDITORS, 819.

Label by.] See CRIMINAL LAW, 663.

CRIMINAL LAW.

1. **Assault with intent to kill — aiming at one and wounding another.]** One discharging a gun into a crowd intending to kill A, but missing him and wounding B, is guilty of assault with intent to murder. *State v. Gilman* (Me.), 257.

2. **Justification.]** An assault with intent to kill cannot be justified in defense of property. *Id.*

3. **Assault with intent to murder — spring-gun.]** It is unlawful for the occupant of lands to set spring-guns or other mischievous weapons on his premises, and if the same cause death to any trespasser it is a criminal homicide. But to authorize a conviction of assault with intent to commit a murder, a specific felonious intent must be proved; and so, where one plants such weapons with the general intent to kill trespassers, and wounds a particular person, he cannot be convicted of assault with intent to commit murder. The intent to kill that particular person alone must be shown, and cannot be implied from the general conduct. *Simpson v. State* (Ala.), 1.

4. **Attempt to commit abortion — intent.]** A statute provided for the punishment of any one who willfully administered any drug or substance whatever, with intent to produce the miscarriage of a pregnant woman. *Held*, that it was not essential to guilt that the woman should be quick with child, nor was it a defense that a harmless substance was administered, provided the guilty intent existed. *State v. Fitzgerald* (Iowa), 148.

5. **Burglary — railroad depot — “warehouse.”]** A railroad depot is “a warehouse” within the meaning of the statute of burglary, although such buildings were unknown when the statute was enacted. *State v. Bishop* (Vt.), 690.

6. **Coercion of wife — presumption.]** Where a wife choked a man and told him to keep still, while her husband picked his pockets, a jury was justified in finding that she was not acting under coercion, but independently. *People v. Wright* (Mich.), 381.

7. **Forgery — “acquittance.”]** A receipt for money as part of the purchase-price of a farm is an “acquittance” within the statute of forgery, and an indictment for forgery thereof is good without charging any extrinsic dealings between the parties. *State v. Shelters* (Vt.), 679.

CRIMINAL LAW — *Continued*

8. — **unauthorized county bonds.]** A county treasurer, without authority, issued and negotiated instruments for the payment of money, purporting in the body to be the obligations of the county, but signed only by him in his own name, with the addition, "treasurer." *Held*, not to be forgery, the same not "being or purporting to be the act of another" within the statute. *People v. Mann* (N. Y.), 482.
9. **Homicide by negligent use of pistol.]** Where the prisoner, in sport and without criminal design, aimed a pistol at another, both supposing it to be unloaded, and the prisoner pulled the trigger, whereby the pistol was discharged and the other was killed, *held*, no crime. *Robertson v. State* (Lea), 602.
10. — **officer shooting prisoner to prevent his escape.]** Where an officer had in custody a prisoner charged with a misdemeanor, and the prisoner trying to escape, the officer shot and killed him, without intending his death, he was guilty of manslaughter. *Reneau v. State* (Lea), 626.
11. **Indictment — "public place" — highway.]** The words "on a public highway," in an indictment, are not equivalent to the words "public place" in a statute against notorious lewdness. *Williams v. State* (Ind.), 135.
12. **Larceny of check.]** A broker, who had been accustomed to buy silver on account of a bank, was instructed by the bank to make a certain purchase of silver on its account, and as he had no funds, the bank certified his check drawn on the bank, and delivered it to him. He did not buy the silver, but used the check for his own purposes. *Held*, that, if he received the check with the intention of so appropriating it, he was guilty of larceny. *People v. Abbott* (Cal.), 59.
13. — **lost goods.]** One who finds lost goods which have no marks or indications of ownership, and who does not know the owner, is not bound to exercise diligence to ascertain the owner, and is not guilty of larceny in retaining the goods. *State v. Dean* (Iowa), 143.
14. **Libel by corporation.]** A corporation is indictable for libel, and the joinder of an individual in a separate count is not error. *State v. Atchison* (Lea), 663.
15. **Murder — firing pistol into dwelling-house without specific intent to kill.]** Where a homicide was committed by firing a pistol, at night, through the window of a lighted room in which four persons were sitting, the court may properly refuse to instruct the jury, on the request of the prisoner, that if he did not intend to kill or shoot at any of the inmates of the room, but merely intended to frighten them, he was not guilty of any higher offense than manslaughter in the second degree; such a charge, without qualification or explanation, being calculated to mislead the jury, by withdrawing from their consideration the recklessness of the act, as showing a depraved mind regardless of human life, which might make the offense murder in the first degree, under the statute. *Washington v. State* (Ala.), 28.

CRIMINAL LAW — *Continued.*

16. — **insanity — burden of proof.**] Every man is primarily presumed sane, but when facts are proved tending to engender a doubt of the sanity of a person accused of crime, it devolves on the State to remove that doubt and establish the sanity of the prisoner to the satisfaction of the jury, beyond all reasonable doubt. *Cunningham v. State* (Miss.), 360.
17. **Rule of responsibility.**] Insanity, to excuse crime, must be such as destroys the power of distinguishing between right and wrong. *Id.*
18. **Rape — of child under twelve.**] A statute fixing the age of puberty in females at twelve; carnal intercourse with a female under that age is rape. *State v. Tilman* (La.), 236.
19. — **evidence — acts of unchastity.**] On a trial for rape, the defendant may prove, by the complainant or others, particular acts of unchastity on the part of the complainant. *Benstine v. State* (Lea), 593.
20. — **complaints.**] On a trial for rape, witnesses may prove the details of complaints of the complainant about the time of the offense. *Id.*
21. **Robbery — fraudulent trick followed by violence.**] The complainant was fraudulently induced by two confederates to expose some money in his hand; one of them then snatched it from him and ran away, while the other held him so that he should not pursue, and a struggle between them ensued. *Held*, that this did not constitute robbery. *Shinn v. State* (Ind.), 110.
22. **Seduction — “previous chaste character.”**] A statute provided for the punishing of the seduction of any unmarried woman “of previously chaste character.” *Held*, that “character” referred to moral qualities and not to reputation, and evidence of reputation was not admissible upon the issue of character, but only to impeach or corroborate testimony regarding particular acts of unchastity. *State v. Prizer* (Iowa), 155.
23. **Trial — receiving verdict in prisoner’s absence.**] A verdict of felony inadvertently received in the absence of the prisoner is void and amounts to acquittal, although his counsel were present and did not object; and the error cannot be cured, after the jury have been discharged, by immediately reassembling the jury, examining on oath those who had left the courtroom and again receiving the verdict in the presence of the prisoner. *Cook v. State* (Ala.), 81.

CURTESY.

See MARRIAGE, 660.

DAMAGES.

1. **Measure of — penalty.**] A shop-keeper sold out his stock, and bound himself in a penalty of \$500 not to engage in that business again in the same place for ten months, nor rent his house for that purpose, during that time. On a breach of this agreement, *held*, that the measure of damages was \$500. *Mues v. Swayne* (Lea), 607.

DAMAGES — *Continued.*

2. **Railway in public street — abutting owner.]** An abutting owner, who does not own the soil of the street, cannot recover for any injury to his freehold resulting from the presence of a steam railway in the street, but only for damages resulting from such misconduct in its management as amounts to a nuisance, as leaving cars standing an unreasonable time, unnecessary noises and dangerous speed. *Grand Rapids and Indiana R. R. Co. v. Heisel* (Mich.), 806.

See CIVIL DAMAGE ACT, 409.

DEBTOR AND CREDITOR.

- Liability of latter for loss of collateral.]** R. being indebted to B., indorsed to him a draft on C., due in thirty days, to be credited on account when collected. The draft was not presented for payment, and C. became insolvent. *Held*, that B. had lost his remedy against R. on the draft and on the original demand. *Butterton v. Roope* (Lea), 638.

DEED.

1. **Condition subsequent — restraint of marriage.]** A grant to a grantor's daughter if she remained single, otherwise to his children, is void, a conveyance in restraint of marriage being illegal unless there is a valid limitation over, and this limitation being void because inferior to a title by descent. *Randall v. Marble* (Me.), 281.
2. **Escrow — bona fide purchaser.]** No title vests in a grantee who obtains possession of an escrow without performance of the condition, and a *bona fide* purchaser from him, after the death of the grantor, acquires no title. *Harkreader v. Clayton* (Miss.), 369.
3. **Of lands held adversely without color of title — voluntary conveyance.]** A conveyance of lands held adversely, under claim of ownership, though without color of title, is void as against the holder, and this applies to a voluntary conveyance by a purchaser on execution sale. *Bernstein v. Humes* (Ala.), 52.
4. **Notice of incumbrance — purchaser, witness of prior deed.]** A purchaser of land is not affected with constructive notice of a prior unrecorded conveyance by the mere fact that he was one of the subscribing witnesses thereto. *Vest v. Michie* (Gratt.), 722.

Voluntary, from husband to wife.] *See* MARRIAGE, 65.

DELIVERY.

To carrier.] *See* SALE, 158.

DEPOSITIONS.

See EVIDENCE, 121.

DEVISE.

See WILL.

DIRECTOR.

See CORPORATION, 62, 194.

DIVORCE.

See MARRIAGE, 571, 687.

DOWER.

Assignment of — improvements by grantees of husband.] In an action for dower in part of a tract of land conveyed by the husband, improvements made by the husband's grantees on the demanded premises are not to be embraced in the estimate of value ; but if the husband's immediate grantee has conveyed in severalty, the increased value by reason of improvements made by such grantees is to be reckoned. *Boyd v. Carlton* (Me.), 268.

EMINENT DOMAIN.

Rights acquired by railway companies in lands condemned for their use.] Under a condemnation of lands for railway purposes, the former owner of the soil still retains the fee, and the right to use the land for every purpose not incompatible with the use of it by the railway company for railway purposes ; and therefore it is error to instruct a jury that he has no right to cross over or under the railroad. *Kansas Central Railway Company v. Allen* (Kans.), 190.

ESCAPE.

Officer shooting prisoner, to prevent.] *See* CRIMINAL LAW, 626.

ESCROW.

See DEED, 369; NEGOTIABLE INSTRUMENT, 682.

ESTOPPEL.

Divorce.] A wife deserted her husband, and after being defeated by him in an effort to obtain a divorce, went to parts unknown, and remained away about three years. On her return to the neighborhood of her husband she declared that during her absence she had obtained a divorce, but declined to tell where she had been. A few years after, her husband, with a view of marrying again, sent a messenger to inquire of her as to the truth of the alleged divorce, to whom she stated that she went away to procure a divorce without interference from her husband, and that she did obtain a divorce, and hoped he would marry again. Soon after he married the defendant, and about the same time his first wife also married again. A few years later the first husband died, childless and intestate; thereupon his first wife, claiming to be his heir, conveyed a tract of land, of which he died seized, to the plaintiff, who brought this action against the second wife to dispossess her of the land ; and on the trial of the case the first wife testified that she never procured a divorce. *Held*, that a finding upon such evidence, even if not amounting to an estoppel, and in accordance with the truth of such admissions, though contradicted

ESTOPPEL — *Continued.*

by her unsupported testimony, would not be clearly against the evidence, and therefore could not be regarded by a reviewing court as erroneous. *Edgar v. Richardson* (Ohio), 571.

See CORPORATION, 83; MUNICIPAL CORPORATION, 145.

EVIDENCE.

1. **Comparative weight of oral, and depositions.]** An instruction that "other things being equal in regard to witnesses, the testimony of those examined in open court is entitled to greater weight than the testimony of witnesses embodied in depositions," is erroneous. *Millner v. Eglin* (Ind.), 121.
2. **Declaration — divorce.]** A wife deserted her husband, and after being defeated by him in an effort to obtain a divorce, went to parts unknown, and remained away about three years. On her return to the neighborhood of her husband she declared that during her absence she had obtained a divorce, but declined to tell where she had been. A few years after, her husband, with a view of marrying again, sent a messenger to inquire of her as to the truth of the alleged divorce, to whom she stated that she went away to procure a divorce without interference from her husband, and that she did obtain a divorce, and hoped he would marry again. Soon after he married the defendant, and about the same time his first wife also married again. A few years later the first husband died, childless and intestate; thereupon his first wife, claiming to be his heir, conveyed a tract of land, of which he died seized, to the plaintiff, who brought this action against the second wife to dispossess her of the land; and on the trial of the case the first wife testified that she never procured a divorce. *Held*, (1) that the admissions of the first wife, that she had obtained a divorce, though relating to a matter of record, were, as against a party claiming under her, admissible in evidence. *Edgar v. Richardson* (Ohio), 571.
3. **— of one whose life is insured for another.]** In an action on a policy of insurance on the life of one for the benefit of another, the declarations of the insured, before or after the insurance, are not competent evidence, unless part of the *res gestæ*. *Mobile Life Insurance Company v. Morris* (Lea), 631.
4. **Of former negligence.]** In an action of damages for negligence in lighting a passage-way and guarding an elevator, evidence of former accidents or escapes from accident is incompetent. *Parker v. Portland Publishing Co.* (Me.), 262.
5. **Handwriting — expert testifying from recollection.]** The genuineness of the signature to a lost instrument may be testified to by an expert who had examined the signature, and who testifies from his recollection of the signature as compared with genuine signatures in evidence. *Abbott v. Coleman* (Kans.), 186.
6. **— expert opinions.]** On a question of handwriting, the opinions of experts, founded solely on a comparison of the writing in dispute with genuine signatures properly in evidence, are competent evidence. *Miles v. Loomis* (N. Y.), 470.

EVIDENCE — *Continued.*

7. Rape — acts of unchastity.] On a trial for rape, the defendant may prove, by the complainant or others, particular acts of unchastity on the part of the complainant. *Benstine v. State* (Lea), 593.
8. Complaints.] On a trial for rape witnesses may prove the details of complaints of the complainant about the time of the offense. *Id.*
9. To explain receipt.] An instrument in this form: "Received of A \$500 due on demand," is open to parol explanation of its consideration, to show that it was intended as a mere receipt. *De Lavallette v. Wendt* (N. Y.), 494.
10. Parol — surety for faithful performance — change in principal's duty.] B. was appointed ticket agent of defendant at Memphis, and gave a bond with sureties for faithful performance of his duty. There were two ticket offices, but the bond did not specify to which he was appointed. Subsequently the offices were consolidated and the duties of both were imposed on him, and his salary was increased, without the knowledge of his sureties. *Held*, that parol evidence was admissible to show to which office he was originally appointed. *Mumford v. Memphis and Charleston Railroad Co.* (Lea), 616.
11. Survivorship — presumption — common disaster.] In the case of a mother, aged sixty-nine years, her son-in-law, aged forty-five, and his two children, aged respectively ten and seven years, who all perish in the same shipwreck, there is no presumption of survivorship. *Newell v. Nichols* (N. Y.), 424.

Of agreement between payee and his immediate indorser.] *See* NEGOTIABLE INSTRUMENTS, 499.

Burden of proof.] *See* CARRIER, 853.

Possession of note.] *See* NEGOTIABLE INSTRUMENTS, 278.

To vary indorser's liability.] *See* NEGOTIABLE INSTRUMENTS, 609.

See GIFT, 428 ; SEDUCTION, 104.

EXECUTION.

See EXEMPTION, 328.

EXEMPTION.

1. Exemption from execution — boarding-house keeper.] Furniture purchased to carry on the business of keeping a boarding-house is exempt from execution like other household goods, and is not within a statute subjecting to execution, on a judgment for the purchase-price, stock in trade or means of carrying on the party's occupation. *Vanderhorst v. Bacon* (Mich.), 828.
2. — partnership property.] A partnership is not within the language or intentment of the exemption law, and hence none of the property of a partnership is exempt from seizure on execution. *White v. Hefner* (La.), 238.

EXEMPTION — Continued.

3. —] Partnership property is not exempt from execution, before division and settlement of the partnership affairs. *Spiro v. Paxton* (Lea), 680.
4. Receipting.] The right to exemption is not waived by the debtor's failing to claim it and receipting to the officer for the goods. *Id.*
5. Homestead — grist-mill.] A public grist-mill, adjoining the owner's farm, but not inclosed with it, is not a part of the homestead for purposes of exemption. *Mouriquand v. Hart* (Kans.), 200.
- From execution, waiver of.] See CONSTITUTIONAL LAW, 42.

See TAXATION, 224.

EXPERT.

See EVIDENCE, 186.

FIXTURES.

When subject to mortgage.] Lessees of a manufactory put in fixed machinery, and afterward bought the premises subject to a mortgage of the realty, including "buildings to be erected thereon." *Held*, that the machinery so put in by them came under the lien of the mortgage. *Jones v. Detroit Chair Company* (Mich.), 814.

FORECLOSURE.

See INSURANCE, 346.

FORGERY.

Unauthorized county bonds.] See CRIMINAL LAW, 482.

Ratification of.] See NEGOTIABLE INSTRUMENTS, 546.

See CRIMINAL LAW, 679.

FORMER ADJUDICATION.

See JUDGMENT, 74, 455.

FRAUD.

Constructive.] Action upon a promissory note for \$20,000, made by the grandfather of the payee, payable in five years, with interest annually. The maker was ninety-two years old and partially blind, but was otherwise in good health, was in good possession of his mental faculties, and active in looking after his financial affairs. He was possessed of a large property, which his grandson assisted him in taking care of, and to do which, at his grandfather's request, he had given up his profession, and for several years had devoted himself to his grandfather's service, as his confidential agent. The grandfather had also given him \$32,000 in his life-time, and the grandson also claimed a gift of \$80,000 beside. He was also a legatee to a considerable amount. When the note was executed it was attached to a stub, the whole being torn from the maker's note-book of blank forms, and filled up and signed in the old gentleman's handwriting. The stub contained memoranda of the date, amount, maturity, and

FRAUD — *Continued.*

payee's name, and the words, "to make the amount the same as Charles W. Cornell." The latter was another grandson, to whom he had given \$20,000. It was shown that he had proposed to alter his will in order to make a better provision for his grandson's services, but was advised by his lawyers to adopt some other mode. A few months afterward the note was executed. *Held*, there was nothing in the relations of the parties or the circumstances to impose the burden on the payee of showing the fairness of the transaction, or imply the idea of undue influence. *Cowee v. Cornell* (N. Y.), 428.

See ATTORNEY AND CLIENT, 23; CHATTEL MORTGAGE, 171; INFANCY, 678.

FRAUDULENT CONVEYANCE.

See HOMESTEAD, 642.

GIFT.

1. **Executed — revocation.]** One who has made a donation *inter vivos* of immovable property to his concubine cannot, on the latter's death, recover the property, on the ground that the donation violated a prohibitory law, and was opposed to good morals. *Monatt v. Parker* (La.), 229.
2. **Negotiable instrument — memoranda.]** Action upon promissory note for \$20,000 made by the grandfather of the payee, payable in five years with interest annually. When the note was executed it was attached to a stub, the whole being torn from the maker's note-book of blank forms, and filled up and signed in the old gentleman's handwriting. The stub contained memoranda of the date, amount, maturity, and payee's name, and the words, "to make the amount the same as Chas. W. Cornell." The latter was another grandson to whom he had given \$20,000. The maker was possessed of a large property, which his grandson assisted him in taking care of, and to do which, at his grandfather's request, he had given up his profession, and for several years had devoted himself to his grandfather's service as his confidential agent. It was shown that the grandfather had proposed to alter his will in order to make a better provision for his grandson's services, but was advised by his lawyers to adopt some other mode. A few months afterward this note was executed. The grandfather had given this grandson \$32,000 in his life-time, and the grandson also claimed a gift of \$30,000 beside, and was legatee to a considerable amount. *Held*, that the stub was not conclusive evidence that the note was designed as a gift. *Cowee v. Cornell* (N. Y.), 428.
3. **Savings bank deposit.]** S. deposited in a savings bank moneys belonging to her in trust for M. and K., who were her distant relatives. She retained the pass-books until her death, drawing out only one year's interest, and M. and K. were ignorant of the deposit. *Held*, that the transaction constituted an effectual trust for their benefit on the death of S. *Martin v. Fink* (N. Y.), 446.

See CONSTRUCTIVE FRAUD, 428; CONTRACT, 105.

GROWING CROP.*See* SALE, 652.**HANDWRITING.***See* EVIDENCE, 186, 470.**HIGHWAY.****Public place.]** *See* CRIMINAL LAW, 185.*See* MUNICIPAL CORPORATION, 48, 221.**HOMESTEAD.****Fraudulent conveyance.]** Where a husband voluntarily conveys land to his wife to hinder and delay his creditors, her right to a homestead therein is not lost. *Ruohs v. Hooks* (Lea), 642.**Exemption — grist-mill.]** *See* EXEMPTION, 200.**HOMICIDE.***See* CRIMINAL LAW, 602.**HUSBAND AND WIFE.***See* MARRIAGE.**IGNORANCE OF FACT.***See* AGENCY, 165.**INDORSEMENT.****In another State.]** *See* CONTRACT, 76.**INFANCY.****1. Contract — fraud.]** Plaintiff, falsely representing himself to be of full age, bought a wagon paying part, and giving his note secured by a lien on the wagon for the remainder. After using the wagon until the use was worth more than what he had paid, and until it had depreciated by more than a like sum, he made default in payment, whereupon defendant took the wagon under his lien, and sold it at auction. Plaintiff brought *assumpsit* for the money he had paid. *Held*, that he was entitled to recover. *Whitcomb v. Joslyn* (Vt.), 678.**2. Contract — void or voidable.]** An infant's deed, without consideration, is void, and not simply voidable. *Seafford v. Ferguson* (Lea), 630.**Custody of infant.]** *See* PARENT AND CHILD, 373.**Injury to infant trespasser.]** *See* NEGLIGENCE, 203.**INJUNCTION.****Against a provoked injury.]** A man bought for speculation certain bottom lands upon which large quantities of sand were being deposited by a

INJUNCTION — *Continued.*

stream which operated a mill above. He put an exorbitant valuation on the land and tried to sell it to the proprietors of the mill, but they declined to buy it. He then prayed for an injunction to restrain them from sanding the land and polluting the stream. *Held*, that an injunction would not lie, as he had invited the injury. *Edwards v. Allouez Mining Company* (Mich.), 301.

See NUISANCE, 535.

INSURANCE.

1. Change of title by legal process or judicial decree — foreclosure by advertisement.] A policy of insurance on a house provided that if the property be sold or transferred, or any change took place in title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance, the policy should be void. A mortgage of the premises subsequently executed was foreclosed and a sale was had, but the period for redemption had not expired nor had possession been changed. A loss subsequently occurring, *held*, that neither the giving of the mortgage nor the foreclosure proceedings avoided the policy. *Loy v. Home Insurance Company* (Minn.), 346.
2. Double — subsequent policy void.] Where, in a contract of insurance which covers a storehouse and the goods therein, it is stipulated that should the assured subsequently take out a policy in any other company the assurers should receive notice of it on pain of forfeiting their policy, a subsequent assurance of the house or the goods in another company, without notice to the assurers, will work the forfeiture of the contract with them, whether the subsequent contract was legally enforceable or not. *Allen v. Merchants' Mutual Insurance Company* (La.), 248.
3. Evidence — declarations of insured.] In an action on a policy of insurance on the life of one for the benefit of another the declarations of the insured, before or after the insurance, are not competent evidence, unless part of the *res gesta*. *Mobile Life Insurance Company v. Morris* (La.), 631.
4. Fraud of insurer — rescission — forfeiture — remedy.] Where, by the terms of a policy of life insurance, the non-payment of the required annual premium, at the designated time, is declared to be a ground of forfeiture, but the uniform custom of the insurance company has been to give notice of the time when the premiums fall due, and to collect the same at the residence of the policy-holder through a local agent residing in his neighborhood, this mode of collection cannot be discontinued, and payment required at the company's office, without notice to the insured: and where the insurance company, under such circumstances, with a view to avoid the policy, gives private instructions to the local agent not to give such customary notice to the insured, and not to call on him as usual, for the payment of the premium, no right arises to declare the policy forfeited, and if the company refuses to accept the premium when duly

INSURANCE — *Continued.*

tendered, and to give the insured the customary renewal receipt, the assured is in equity entitled to a rescission of the contract, and a return of the premiums paid thereon, with interest from the times of payment.

Union Central Life Insurance Co. v. Pottker (Ohio), 555.

5. Over-valuation.] A policy of fire insurance conditioned to be void for over-valuation is avoided by any substantial over-valuation, whether fraudulent or innocent. *Boutelle v. Westchester Fire Insurance Co.* (Vt.), 666.

6. Oral agreement for.] An oral agreement for insurance will be enforced in equity. *Wooddy v. Old Dominion Insurance Co.* (Gratt.), 732.

7. Payment of premium.] An agreement for insurance having been made by the applicant, and the agent of the insurer authorized to fill up and deliver policies, the former tendered the premium to the latter, but the latter, residing in the house insured and owing the former for rent, said he would apply the premium toward the rent. The company was at the time indebted to the agent in about three-quarters the amount of the premium. *Held*, a valid payment of the premium. *Id.*

8. Representation of title.] A condition in an insurance policy, that any interest in the property insured, not absolute or less than a perfect title, must be represented and expressed in the policy, is not broken by the existence of a lien for purchase-money reserved in the deed of the premises. *Id.*

9. By husband on wife's goods — knowledge of insurer.] A policy of insurance taken by a husband in good faith on his wife's goods is void, even though the insurer had full knowledge of the true ownership. *Agricultural Insurance Co. v. Montague* (Mich.), 326.

INSANITY.

Widow neglecting to dissent from husband's will.] A widow, in consequence of her lunacy, neglected to dissent from the provisions of her husband's will within the statutory time. *Held*, that she might afterward, in equity claim her rights in the estate as if she had duly dissented. *Wright v. West* (Lea), 586.

Suit by insane wife, by fraud of husband.] *See* MARRIAGE, 67.

See CRIMINAL LAW, 360.

INTEREST.

On damages.] In an action for breach of a contract to hire rooms for a certain time at an agreed price, interest must be awarded upon the recovery, as matter of law. *De Lavallette v. Wendt* (N. Y.), 494.

After maturity.] *See* USURY, 70.

INTENT.

Absence of specific — murder.] *See* CRIMINAL LAW, 23.

See AGENCY, 165 ; CRIMINAL LAW, 143.

INTOXICATION.

See SUNDAY, 357.

JUDGMENT.

1. Former adjudication.] A physician sued for services, in a justice's court; the defendant answered, but withdrew his answer, and the plaintiff got judgment without contest. *Held*, a bar to a subsequent action by the defendant against the physician for malpractice in rendering those services. *Blair v. Bartlett* (N. Y.), 455.

2. Former — when a bar — splitting claim.] Church trustees employed the plaintiff as a teacher and sexton for a year at a fixed compensation, and at the request of the priest he performed similar services a second year on his promise of the same compensation. After all the services had been rendered he recovered judgment against the trustees for a balance due on the first year. *Held* a bar to an action for the second year's services. *Rosenmueller v. Lampe* (Ill.), 74.

3. — action on — jurisdiction.] A judgment of a Canadian court on personal service of process in Michigan, where the defendant did not appear or recognize the jurisdiction, will not support an action in Michigan, although the laws of Canada provide for such a service. *McEwan v. Zimmer* (Mich.), 332.

Act of legislature authorizing opening of.] *See* CONSTITUTIONAL LAW, 716.

JURY.

Trial by, waiver of.] *See* CONSTITUTIONAL LAW, 84.

Involuntary separation.] *See* TRIAL, 530.

LANDLORD AND TENANT.

Boundary on non-navigable stream — accretions.] A lessee of land bounded by the "present bank" of a non-navigable stream is entitled during his term to the accretions formed by the receding of the stream or a change in its current, in the same manner as a grantee would be entitled. *Coti v. Lavalie* (Ill.), 91.

Liability between, for negligence.] *See* NEGLIGENCE, 349.

LARCENY.

See CRIMINAL LAW, 59, 143.

LIBEL.

See CRIMINAL LAW, 663.

LICENSE.

Of sale of intoxicating liquors.] *See* LOCAL OPTION, 344; STATUTE, 648
See MUNICIPAL CORPORATION, 145, 746.

LIEN.

Of bailee, for repairs.] *See* BAILMENT, 299.

See CONSTITUTIONAL LAW, 508.

LIMITATION.

Of carrier's liability.] *See* CARRIER, 505.

LOCAL OPTION.

See CONSTITUTIONAL LAW, 344.

LOST PROPERTY.

See CRIMINAL LAW, 143.

MARRIAGE.

1. **Assumption by married woman as grantee of mortgage on granted premises.]** A married woman, by the terms of a deed to her, assumed and agreed to pay a mortgage existing upon the conveyed premises. *Held*, that this made her personally liable for the mortgage debt, and that her grantee, in like manner assuming the mortgage, was likewise liable, and a judgment against him for deficiency on foreclosure was proper. *Cushman v. Henry* (N. Y.), 487.
2. **Married woman — conveyance to, subject to vendor's lien.]** A married woman, accepting a conveyance of land to her separate use, reserving a lien for unpaid part purchase-money, is bound by the conveyance, and cannot recover her payments, and the lien may be enforced. *Jackson v. Rutledge* (Lea), 655.
3. **Deed from husband to wife.]** A voluntary deed from husband to wife will be upheld as against the husband's heirs, where the gift is a reasonable provision for the wife. *Majors v. Evertson* (Ill.), 65.
4. **Note from husband to wife.]** Equity will enforce a note executed by a husband to his wife, during coverture, in consideration of her moneys received or collected by him. *McC Campbell v. McC Campbell* (Lea), 623.
5. **Suit by wife against husband on note executed to her during coverture.]** Under a statute which enables married women to acquire, hold and deal with property, and to sue and be sued in the same manner as if unmarried, and relieves all such property, except such as comes by gift from their husbands, from liability to the disposal of their husbands or for their debts, a married woman may maintain an action against her husband on a note given directly to her by him for a valuable consideration during coverture. *May v. May* (Neb.), 399.
6. **Tenancy by curtesy.]** Land was conveyed to a woman for her separate estate, free from the control and liabilities of her husband, and with full power of disposition. *Held*, that in the absence of words clearly expressing a different purpose the husband was entitled to his tenancy by curtesy. *Carter v. Dale* (Lea), 660.
7. **Wife's contract for family necessities.]** A contract by a married woman for necessities sold on the credit of her estate, for herself and family, and charged thereon, may be enforced against it in equity to the extent of her interest. *Priest v. Cone* (Vt.), 695.
8. **Wife's separate property — when charged with her debts.]** Debts contracted by a married woman in the management and for the benefit of her separate property, or for her benefit on its credit, will in equity be charged

MARRIAGE — Continued.

on such property, whether it be personalty or realty, unless the instrument creating her estate therein protects it from being so charged, although she could not exercise the *jus disponendi* without procuring the formal concurrence of her husband, or the permission of the court; although the husband had possible rights as tenant by curtesy; although she allowed the profits arising from the property for which the debts were contracted to be used in the support of the family of herself and her husband, and although the charges were made to both husband and wife. *Dale v. Robinson* (Vt.), 669.

9. Divorce — on suit of insane wife by fraud of husband.] A divorce was granted in a suit brought in the name of an insane wife, in confinement in an asylum in another State. On a bill filed on her behalf to set aside the divorce, alleging that it was procured by the fraud of the husband, *held*, that, whether there was fraud, in fact or not, the law would presume fraud, and set aside such a divorce, no matter by whose advice it was obtained. *Bradford v. Abend* (Ill.), 67.

10. — in another State — obtained without residence.] A decree of divorce obtained in another State, where neither party at the time had a residence in good faith, is void. *Gettys v. Gettys* (Lea), 637.

Restraint of.] *See* DEED, 281.

Coercion of wife.] *See* CRIMINAL LAW, 831.

See CONTRACT, 105; PARENT AND CHILD, 373.

MARRIED WOMAN.

See MARRIAGE.

MASTER AND SERVANT.

1. Negligence of agent — liability of master.] The plaintiff was a train hand employed by the defendant, a railroad company, in digging gravel under the direction of L., who was engineer, superintendent and conductor and master of the gravel and material train of defendant, and who had entire charge of that branch of the business on a section of the railroad, with power to employ and discharge hands. *Held*, that the plaintiff and L. were not mere fellow-servants, and that the plaintiff might recover of defendant for an injury sustained by L.'s negligence. *Dobbin v. Richmond and Danville Railroad Company* (N. C.), 512.

2. Responsibility of servant to master for consequences of his negligence.] In an action by a railway conductor against his employer for wages, the employer may set off and recover damages resulting to him from the conductor's negligence in performing the work; and the conductor is not relieved from his duty to exercise reasonable care by the known imperfect equipment of the train in respect to which his negligence occurred. *Mobile and Montgomery Railway Co. v. Olanton* (Ala.), 15.

Rescission by employer.] *See* CONTRACT, 93.

MEASURE OF DAMAGES.

See DAMAGES.

MECHANICS' LIEN.

On municipal building.] Although land donated and devoted to public uses cannot be subjected to debts of the municipality, yet a public building thereon, as a jail, is subject to a mechanics' lien in favor of one who built it for the municipality. *McKnight v. Parish of Grant* (La.), 226.

MORTGAGE.

Assumption of, by married woman.] *See* MARRIAGE, 437.

Power of National bank to enforce.] *See* NATIONAL BANK, 412.

When covers fixtures.] *See* FIXTURES, 814.

See CHATTEL MORTGAGE, 171.

MUNICIPAL CORPORATION.

1. Authority to require lot-owner to pave sidewalks.] A city ordinance, requiring the owners of lots on streets which have been graded, paved and guttered, to pave the sidewalks adjoining their lots, is valid, and if the owners do not comply, the city may do the work and collect the expense from the owners. *Sands v. City of Richmond* (Gratt.), 742.

2. Duty to keep streets in repair — when implied.] The duty of a municipal corporation to keep in repair its streets and sidewalks need not be expressly enjoined by statute, but is implied from a statutory grant of power to open, improve, repair and keep them in a safe condition for travel, and to raise the necessary funds by taxation or assessment. *Albrittin v. Mayor and Aldermen of Huntsville* (Ala.), 46.

3. Liability of city for injury from defective street.] A city bound by its charter to keep its streets in repair is liable to one who, without negligence on his own part, suffers injury from their long-continued and notorious want of repair. *O'Neill v. City of New Orleans* (La.), 221.

4. —.] A municipal corporation, empowered to lay out and keep streets in repair, is liable in damages to an individual who sustains injury by the defective condition of a street. *Noble v. City of Richmond* (Gratt.), 726.

5. Negligence — contributory — icy sidewalk.] A person who voluntarily attempts to pass over a sidewalk of a city, which he knows to be dangerous by reason of ice upon it, which he might easily avoid, cannot be regarded as exercising ordinary prudence, and cannot maintain an action against the city to recover for injuries sustained by falling upon the ice. *Schaeffer v. City of Sandusky* (Ohio), 533.

6. — quasi street — low bridge.] Where the officers of a municipal corporation have treated a piece of land as a public street, taking charge of, regulating and paving it like other streets, although it has never been legally laid out as a street, the corporation is chargeable with the same duties and subject to the same liabilities as if it had been prop-

MUNICIPAL CORPORATION — *Continued.*

erly laid out, and is bound to keep it in safe condition for travel. The fact that a bridge over a city street is of sufficient height to allow ordinary carriages to pass under it does not of itself discharge the municipality from liability to one injured while attempting to pass under it in a vehicle of unusual height, as in this case, a circus wagon. *Sewall v. City of Cohoes* (N. Y.), 417.

7. **Obstruction to alley.]** Alleys are not primarily designed as streets, but simply as a means of local convenience to a limited neighborhood, and a roof twelve or fifteen feet over and above an alley is not necessarily an obstruction. *Beecher v. People* (Mich.), 316.

8. **Liability of township for injury by defective highway.]** In the absence of a statutory liability a town is not liable in a civil action for damages occasioned by a defect in a highway. *Eikenberry v. Township of Bazaar* (Kans.), 198.

9. **License — non-resident — double taxation.]** Defendant, living outside of a city, hired a stall and carried on the butcher's business in the city market. He owned carts and horses, which he used for carrying meat from his house to the stall, and carrying back that which was unsold. He paid a property tax on the carts and horses at his residence. *Held*, that the city might legally exact a license fee for the use of them in the city, being thereto authorized by its charter. *Frommer v. City of Richmond* (Gratt.), 746.

10. — **for street railway — estoppel.]** A municipal corporation granted permission, by ordinance, to a street railway company to lay a double track in its streets. The company proceeded to do so, and expended large sums of money in the work. *Held*, that the municipal corporation could not thereafter restrict the permission to a single track, it not appearing that the double track would cause any injury or inconvenience. *City of Burlington v. Burlington Street Railway Co.* (Iowa.), 145.

Right to collect wharfage.] See CONSTITUTIONAL LAW, 218.

See TAXATION, 228.

MURDER.

See CRIMINAL LAW, 28, 360.

NATIONAL BANK.

1. **Bill to recover usury.]** A bill in equity will not lie to recover usury from a National bank. *Hambright v. National Bank* (Lea), 629.

2. **Power to enforce mortgage.]** A National bank organized as successor to a State bank may maintain an action to foreclose a mortgage of real estate executed to the State bank as security for a note, and assigned to it by the State bank on the formation of the National bank. *Schofield v. State National Bank of Lincoln* (Neb.), 412.

NATIONAL BANK — *Continued.*

3. Power to deal in promissory notes.] A National bank has no power to deal or speculate in promissory notes or to acquire title thereto, except by discount. *First National Bank of Rochester v. Pierson* (Minn.), 841
4. Usury — set-off — accommodation indorser.] Under the National Bank Act, in an action upon a note usuriously discounted by a National bank, the amount of the usury may be set off by an accommodation indorser, although the note does not carry interest on its face. *National Bank of Auburn v. Lewis* (N. Y.), 484.

NECESSARIES.

Wife's contract for family.] *See* MARRIAGE, 695.

NEGLIGENCE

1. Removing minerals — injury to owner of surface soil.] One who conveys land to another, reserving the right to remove the underlying coal, is bound to exercise ordinary care in the removal, and if necessary, to leave pillars or ribs of coal to support the surface of the soil, although the reservation exempted him from any liability for injury to the surface of the land by reason of the mining operations. *Livingston v. Moingona Coal Co.* (Iowa), 150.
2. Liability for, as between landlord and tenant.] A mill company, owning land on the bank of a river, constructed a canal by which it furnished water-power to persons on both sides, to whom it rented mill sites, with a right of way across the canal. The canal was entirely covered over with a platform of wood, which had been used for ten years, to the company's knowledge, by all persons having business at those mills, for the purpose of passing and repassing. Among the tenants was M., who sub-let, and whose tenant constructed that part of the platform opposite his premises. When the sub-lease expired, M. continued in possession under his lease. *Held*, that the duty of keeping the platform in repair, as to the public, devolved on the company and not on M. *Nash v. Minneapolis Mill Co.* (Minn.), 849.
3. Signing an instrument capable of change by separation to a note.] One who signs and delivers a contract, in form like a negotiable promissory note, but with a condition limiting his liability, so appended as to be capable of separation, leaving an apparently perfect note, is liable to an innocent indorser of such note who acquires the same for value and before maturity, after such separation has been made by the payee, without the maker's knowledge. *Noll v. Smith* (Ind.), 181.
4. Warehouseman — burden of proof — burglary.] In an action against a warehouseman for goods lost, it appearing that they were stolen by a burglar, the burden is still on the plaintiff to show that the negligence of the defendant contributed or led to the loss. *Clafin v. Meyer* (N. Y.), 467.
5. Contractors — excavation in sidewalk.] The plaintiff sued the owner of a city lot and a person who had contracted with him to erect a building thereon,

NEGLIGENCE — *Continued*.

for injuries alleged to have been sustained by her through their negligence in making and leaving open an excavation in the sidewalk in front of the premises. The owner answered that the premises were at the time in the exclusive possession and control of the co-defendant, who had contracted with him to erect a building thereon, and who was a skillful, reliable and competent builder. *Held*, that the answer was sufficient. *Ryan v. Curran* (Ind.), 123.

6. **Dangerous premises — license.]** One owes no duty to a mere licensee to keep safe his premises. *Parker v. Portland Publishing Co.* (Me.), 262.
7. **Contributory neglect.]** Every person, whether a mere licensee, or upon express or implied invitation, seeking access to a place of business, is himself bound to use ordinary care. *Id.*
8. **— when a defense.]** In an action of negligence, although the plaintiff's negligence may have contributed to the accident, yet he may recover if the defendant could have avoided the injury by the exercise of ordinary care, but not otherwise. *Richmond and Danville Railroad Company v. Anderson's Adm'r* (Gratt.), 750.
9. **— infant injured while playing on railway turn-table.]** A boy, twelve years of age, was injured while playing on a railway turn-table, left unlocked and unguarded, in an open prairie, where persons frequently passed. *Held*, that the questions of negligence and contributory negligence were for the jury. *Kansas Central Railway Company v. Fitzsimmons* (Kans.), 203.

See CARRIER 321, 353, 379; CRIMINAL LAW, 602; MASTER AND SERVANT, 15 512; MUNICIPAL CORPORATION, 418, 726.

NEGOTIABLE INSTRUMENT.

1. **Alteration — recovery on original consideration.]** The payee of a note, honestly supposing he had the right to do so, altered the note by reducing its amount, and then transferred it to a *bona fide* purchaser. *Held*, that there could be no recovery on the note, but the holder might recover on its original consideration. *State Savings Bank v. Shaffer* (Neb.), 394.
2. **— renewal.]** A promissory note, payable "at the banking-house of Hoge, Sheets & Co., Bellaire, Ohio," was indorsed for accommodation, by the defendants and by others, and afterward, without the consent or knowledge of the defendants, the maker altered the place of payment to "National Bank of West Virginia, at Wheeling," and it was negotiated for his benefit to a *bona fide* purchaser. That note was twice renewed, the defendants and others indorsing both renewals, and the original and the first renewal note being surrendered. In an action upon the last renewal, *held*, that although the alteration of the original note would have discharged the defendants, yet the renewals were upon a new consideration, namely, the extension of time to the maker, and the defendants were liable. *Bank of the Ohio Valley v. Lockwood* (W. Va.), 768.

NEGOTIABLE INSTRUMENT — *Continued.*

3. **Delivery — escrow — consideration.]** G., wishing to pay to each of his three nephews a third part of their father's interest in his mother's dower estate, which G. had had and enjoyed, but recovery of which had become barred by the statute of limitations, and also wishing to make to each a gift, having declared to them his purpose so to do, drew three promissory notes, payable one to each, in one year after his death, intending to leave them in the hands of some third person, subject to his own control, to be delivered after his death, if he should not retake them or otherwise direct. He put the notes into an envelope, sealed and addressed to one of the nephews and others, in care of F., and delivered it to F., with directions about its custody, which F. indorsed on a wrapper that he put around the envelope as follows: "Letter left in my care by Benj. Giddings, to be handed to Mr. Giddings, if he calls for it; otherwise not to be opened in his life-time." The intestate died without ever having called for the package. After his death, F. delivered the notes to the respective payees. *Held*, a valid delivery of the notes, and that they were upon a valuable consideration, and enforceable for the full amount, although the original claim was less than the note. *Giddings v. Giddings' Administrator* (Vt.), 682.
4. **Evidence — agreement between payee and his immediate indorsee.]** In an action upon a note by a remote indorsee, who purchased *bona fide* for full value and without notice, against the payee who indorsed the note in blank, evidence of an agreement between the payee and his immediate indorsee that the former should not be held liable on his indorsement is not admissible, and the plaintiff holds the note unaffected by such agreement. *Hill v. Shields* (N. C.), 499.
5. — **burden of proof as to good faith.]** Possession of a promissory note is *prima facie* evidence of a *bona fide* holding, but if there is evidence of fraud in its inception the burden is on the indorsee to show that he took it without notice of the fraud. Mere suspicious circumstances will not amount to such notice. *Kellogg v. Curtis* (Me.), 273.
6. — **to vary indorser's liability.]** As between the immediate parties to a note, evidence is admissible to show an agreement at the time of execution that the liability of an apparent indorser should be only that of a surety, guarantor or co-maker. *Taylor v. French* (Lea), 609.
7. **Forgery — ratification.]** A mere promise to pay a forged note, when such promise is given by the supposed maker of the note without any new consideration, and after the promisee has acquired the note, is not binding. *Workman v. Wright* (Ohio), 546.
8. **Indorsement without recourse — warranty of prior signatures.]** One who transfers a negotiable promissory note by indorsement without recourse impliedly warrants the genuineness of the prior signatures, and that so far as he is concerned the paper expresses the exact legal obligations of all such prior parties. *Challiss v. McCrum* (Kana.), 181.
9. **Memorandum.]** Action upon a promissory note for \$20,000, made by the

NEGOTIABLE INSTRUMENT — *Continued.*

grandfather of the payee, payable in five years, with interest annually. When the note was executed it was attached to a stub, the whole being torn from the maker's note-book of blank forms, and filled up and signed in the old gentleman's handwriting. The stub contained memoranda of the date, amount, maturity and payee's name, and the words, "to make the amount the same as Chas. W. Cornell." The latter was another grandson to whom he had given \$20,000. A few months afterward the note was executed. The stub was removed, and the note was transferred to the plaintiff, after interest had fallen due and remained unpaid, the plaintiff giving his own note for it, which remained overdue and unpaid in the hands of the payee. *Held*, that the plaintiff was not a *bona fide* holder. *Cowee v. Cornell* (N. Y.), 428.

10. **Note by trustee signing individually.]** Trustees of a church signed as individuals a note simply describing them as such trustees. *Held*, that they were liable, individually, and that parol evidence was inadmissible to vary the liability. *Hypes v. Griffin* (Ill.), 71.
 11. **Giving notice of protest.]** Notice of protest was posted on the day of maturity, addressed to the indorser at his former residence, and thence forwarded on the following day by the same mail to his residence, where he received it. *Held*, sufficient. *First National Bank of North Bennington v. Wood* (Vt.), 692.
 12. **Waiver of demand and notice.]** A payee of a negotiable note indorsing it under a waiver of demand and notice, all subsequent indorsers are deemed to assent to the same waiver, in the absence of any contrary provision. *Parshley v. Heath* (Me.), 246.
 13. **— of protest — general assignment by maker to indorser.]** M. was indorser upon a series of notes made by C., who had assigned all his property, for the benefit of all his creditors equally, to M. After the assignment, M. told the bank, holder of the notes, to bring them to him as they matured, and he would pay them, or waive protest on them. This was done upon all the notes but the last. At noon of the day the last became due, the bank clerk presented it to M. for payment, who said he would not pay it or waive protest on it, because the signature was not his, but a forgery. *Held*, the necessity of demand and notice was not dispensed with. *Second National Bank of Cleveland v. McGuire* (Ohio), 539.
- Negligent signing of.]** See NEGLIGENCE.

NOTE.

See NEGOTIABLE INSTRUMENT.

NOTES.

- Assignment for benefit of creditor — authority to sell on credit, 303.
 Carrier — perishable property, 567.
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NOTES — Continued.

- Constitutional law — waiver of exemption from execution, 44.
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 Negligence — contributory, infant trespasser, 206.
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 "Public place" and "public house," 188.
 Sale — piano on rent, 81.
 Vendor's lien — statute of limitations, 41.
 Witness — rights of accomplice testifying for State, 532.

NOTICE.

Of incumbrance.] *See* DEED, 722.

NOTICE OF PROTEST.

See NEGOTIABLE INSTRUMENT.

NUISANCE.

Adjoining machinery — injunction.] An injunction will not issue to restrain one from operating machinery in a lawful business, on the ground that it shakes and cracks the walls of the plaintiff's adjoining houses, and diminishes their rental value, it appearing that an adequate remedy existed in an action for damages, and that the plaintiff did not object to the erection of the machinery, but submitted to its use for seven years. *Goodall v. Crofton* (Ohio), 535.

OFFICE AND OFFICER.

Liability of county treasurer for moneys lost by robbery.] A county treasurer and his sureties are not liable for public moneys of which the principal was violently robbed without his fault. *Chamberland v. Penick* (Me.), 284.

PARDON.

Federal — effect on right to vote in State.] A pardon by the president of the United States of one convicted of embezzlement, in a Federal court, restores the offender to his right as a voter in the State. *Jones v. Board of Registrars* (Miss.), 885.

PARENT AND CHILD.

Right of father to confer custody of child as against widow.] A father gave his son, ten years of age, to a man of good character and ample means, to keep him during minority. The father dying three years afterward, the mother brought *habeas corpus* for the child. *Held*, that she was entitled to his custody, although she was poor and dependent, and he preferred remaining with defendant. *Moore v. Christian* (Miss.), 875.

PARTNERSHIP.

Bond of partners, for partnership purposes, executed in individual names.] An obligation under seal executed by all the members of a firm, in and for its business, and for its benefit, binds the firm, although the firm name is not mentioned, and although it appears upon its face to be simply the obligation of the partners contracted in their individual names. *Berkshire Woolen Co. v. Juillard* (N. Y.), 488.

Exemption of property of, from execution.] *See* EXEMPTION, 238.

See EXEMPTION, 650.

PARTITION.

Unborn child.] The court has no jurisdiction to order partition of lands, between heirs of a father, where the petition alleges that one heir is alive and that the mother is pregnant by the father. *Gillespie v. Nabors* (Ala.), 90.

PARTY WALL.

Contribution.] One owner of a party wall, who adds to it for his own use, may maintain an action of contribution against the other owner who has used such additions, for one-half the value of the additions when made. *Sanders v. Martin* (Lea), 598.

PENALTY.

See STATUTE, 548.

PERISHABLE PROPERTY.

See CARRIER, 561.

PRECATORY WORDS.

See WILL, 612.

PRINCIPAL AND SURETY.

See SURETY.

PRIVILEGED COMMUNICATION.*See SLANDER AND LIBEL, 698, 757.***PROMISSORY NOTE.***See NEGOTIABLE INSTRUMENT.***PROTEST.***See NEGOTIABLE INSTRUMENT.***PUBLIC POLICY.***See CONTRACT, 158.***RAILROAD.****Street — damages against — by abutting owner.]** *See DAMAGES, 806.**See MUNICIPAL CORPORATION, 145; CONTRACT, 158; EMINENT DOMAIN 180.***RAPE.***See CRIMINAL LAW, 206.***RATIFICATION.****Of forgery.]** *See NEGOTIABLE INSTRUMENTS, 546.***RECEIPTING.***See EXEMPTION, 828.***RES ADJUDICATA.***See JUDGMENT, 455.***RESCISSION.****Of insurance.]** *See INSURANCE, 555.**See SALE, 79; CONTRACT, 92.***REVOCATION.***See GIFT, 229.***ROBBERY.***See CRIMINAL LAW, 110.***SALE.**

1. Conditional on payment — check — laches.] Where goods are sold for cash, and delivered, the vendor taking the vendee's check for the price, which on presentment four days thereafter is dishonored, the vendor may rescind the contract and reclaim the goods. *Hodges v. Barrett (Ohio), 527.*

2. Delivery to carrier — effect of, as against creditors of vendor.] Grain was placed on railway cars, directed to the consignee, under an agreement

SALE — *Continued.*

that he was to sell it and apply the proceeds to repay indebtedness of the consignor for previous advances. *Held*, that the consignee acquired no lien as against a creditor of the consignor, attaching the grain before the shipping receipts were forwarded. *Hodges v. Kimball* (Iowa), 158.

3. **Implied warranty — fitness for particular use.]** On a sale of goods by a manufacturer for a particular purpose, there is an implied warrant of fitness for that purpose; but the manufacturer is not bound to furnish the best that are or can be made, but only such as are usually made and used, and as are reasonably fit for the purpose. *Harris v. Waite* (Vt.), 694.
4. **Piano on rent — rescission — recovery of payments.]** The plaintiff, upon delivery to him of a piano by the defendant, paid some cash and executed notes for the balance of the price, conditioned that the piano should remain the property of the payee until maturity of the last note, and on any default of payment should be returned to him, and on full payment should become the property of the maker. The first note not being paid, it was agreed that the piano and the notes should be respectively surrendered, and this was accordingly done. Afterward this action was brought by the maker of the notes to recover the cash payment. *Held*, (1) that the transaction was a sale and not a lease; (2) there was no rescission, and the cash payment could not be recovered; (3) *it seems* if the defendant were liable to refund, he would be entitled to recoup or set off any damages for the plaintiff's breach or for deterioration of the instrument. *Latham v. Sumner* (Ill.), 79.
5. **Of growing crop as against execution creditor.]** In consideration of supplies, A, by a written instrument, not recorded, sold to B so much of a growing crop of cotton as would be sufficient to make two bales of lint cotton, each weighing not less than 500 pounds, the same to be gathered, prepared for market and delivered by the first of the next December. C, an execution creditor, levied on seed cotton in a pen, part of the crop, before the first of December. *Held*, that C's levy had preference, although A, before the levy, intended to gin, bale and deliver that particular cotton to B. *Williamson v. Steele* (Lea), 652.
6. **To one for another's use—promise by latter to pay.]** Where goods are sold to one for the use and benefit of another, by whom they are received and used, the latter cannot be held therefor merely upon his acknowledgment of the correctness of the account and his oral promise to pay it. *Hendricks v. Robinson* (Miss.), 382.

SEDUCTION.

Evidence to sustain action for.] In an action by a father for the seduction of his minor daughter, proof of the sexual intercourse followed by pregnancy; confinement and child birth, all while the daughter was living with the father, is sufficient. *Leucker v. Steilen* (Ill.), 104.

See CRIMINAL LAW, 155.

SET-OFF.

Bond of indemnity — obligor's services.] In an action on a bond for the faithful and honest discharge of the obligor's duty as agent, the defendant may set off his services as such agent. *Baltimore and Ohio Railroad Co. v. Jamason* (W. Va.), 775.

Debt against tax.] See TAXATION, 228.

See NATIONAL BANKS, 484.

SIDEWALKS.

Authority to require lot-owner to pave.] See MUNICIPAL CORPORATIONS, 742.

See MUNICIPAL CORPORATION, 588.

SLANDER AND LIBEL.

1. **"Malpractice"—physician.]** To charge a physician with "malpractice" in a particular case is not conclusively libellous in itself, if untrue, but it is for the jury to determine whether the word was used in a general and actionable sense. *Rodgers v. Kline* (Miss.), 389.

2. **Privileged communication.]** The plaintiff and defendant were congregational ministers and members of a county association of such ministers, recognized by congregational churches, and membership in which was considered among the churches as evidence of good ministerial standing. This association, at the instance of defendant, unanimously adopted resolutions implying that the plaintiff had been guilty of untruthfulness, deception, and creating disturbance among the churches, withdrawing fellowship from him temporarily, inviting him to appear and show cause why he should not be dismissed without the recommendatory letter to other churches usually granted to members in good standing, and directing that the resolutions be sent to certain denominational newspapers. The defendant spoke and voted for the resolutions. The resolutions were published in those newspapers, one of which circulated throughout New England and the other in Vermont, and which were the recognized denominational organs. For several years previous, reports of difficulty between plaintiff and his parishioners were in circulation, and defendant had received letters from ministers and parish committees in various places where plaintiff was preaching, giving unfavorable accounts of his career, and some of them speaking of him as unfit for the office and work of the ministry, and asking defendant to do what he could to restrain him. *Held*, that defendant's action, and the publication of the preamble and resolutions, were privileged, and the burden was on the plaintiff to prove malice. *Shurtleff v. Stevens* (Vt.), 698.

3. **— candidate for office.]** To charge a candidate for a popular office with being uneducated, lazy, idle and ignorant, is not libellous; nor is it libellous *per se* to charge him with being "a social leper" who should be "deodorized." But otherwise to charge him with being a professional gambler, bully, thief and whore-master. *Sweeney v. Baker* (W. Va.), 757.

SPRING-GUN

See CRIMINAL LAW, 1.

STATUTE.

1. **Construction — forfeiture or penalty.]** A statute which prohibits any railroad corporation from demanding and receiving for the transportation of passengers more than three cents per mile, for a distance of more than eight miles, gives the party aggrieved a right to recover from such corporation a forfeiture of not less than twenty-five dollars for each case of overcharge. *Pittsburgh, Cincinnati and St. Louis Railway Company v. Moore* (Ohio), 543.
2. **Repeal of charter — effect upon liquor license valid before repeal.]** A statute prohibited the sale of intoxicating liquors within four miles of any incorporated institution of learning, except within incorporated towns. The defendant had a license to sell in a town in which there was such an institution. The charter of the town being repealed, *held*, that the defendant was liable to prosecution under the statute. *Johnson v. State* (Lea), 648.

STATUTE OF FRAUDS.

1. **Promise to pay the debts of another.]** Defendant, a creditor of W. & M., who were engaged in running a saw-mill, agreed to take the mill, manufacture the logs into lumber, market them, and apply the net proceeds to his own demand, and to other debts, among which was one due the plaintiff for work. The defendant explained the arrangement to the plaintiff, employing him upon wages in his own service, and reiterating the promise to pay the debt of W. & M. The defendant having disposed of about one-half the lumber, the plaintiff sued upon the promise to pay that debt. *Held*, that the promise was within the statute of frauds. *Belknap v. Bender* (N. Y.), 476.

STATUTE OF LIMITATIONS.

See SALE, 382 ; VENDOR AND PURCHASER, 38.

STOCKHOLDER.

Individual liability of.] *See* CORPORATION, 83.

STREET.

See MUNICIPAL CORPORATION, 418, 726.

See HIGHWAY.

SUNDAY.

1. **Action to recover goods sold on — intoxication of vendor.]** Although a contract of sale on Sunday is void, yet the seller cannot recover the chattels sold nor damages for their value. Otherwise, if he had been intoxicated by the purchaser for the purpose of defrauding him. *Block v. McMurry* (Miss.), 357.

SUNDAY — *Continued.*

2. Defective highway — contributing cause of injury.] Where one walking on the Lord's day for exercise went into a beer shop and drank a glass of beer and on resuming his walk was injured solely by a defect in the highway, *held*, that he might recover. *Davidson v. City of Portland (Me.)*, 253.

See BAIL, 18.

SURETY.

1. For faithful performance — change in principal's duty.] B was appointed ticket agent of defendant at Memphis, and gave a bond with sureties for faithful performance of his duty. There were two ticket offices, but the bond did not specify to which he was appointed. Subsequently the offices were consolidated and the duties of both were imposed on him, and his salary was increased, without the knowledge of his sureties. *Held*, that his sureties were discharged. *Mumford v. Memphis and Charleston Railroad Company (Lea)*, 616.
2. Oral agreement to extend time of payment.] An oral agreement for the extension of the time of a principal to pay a note will not discharge a surety on the note. *Berry v. Pullen (Me.)*, 248.
3. Recovery by, of usurious interest paid for principal.] One who becomes a surety on a note, at the request of the principal, and with him agrees to pay usurious interest thereon, and who pays the note after maturity, with such interest, may recover of the principal the money he so pays. *Jackson v. Jackson (Vt.)*, 688.

SURFACE.

Of soil, injury to.] *See* NEGLIGENCE, 150.

SURFACE WATER.

Obstruction of.] *See* WATER AND WATER-COURSE, 114, 216.

SURVIVORSHIP.

Presumption of.] *See* EVIDENCE, 424.

TAXATION.

1. Exemption — parsonage or rectory.] A statute exempted from taxation churches and other public buildings for religious worship, with the appurtenant lots of ground used therewith for that purpose. *Held*, that this did not embrace a parsonage or rectory. *First Presbyterian Church v. City of New Orleans (La.)*, 224.
2. Municipal corporation — offset of debt against tax.] A debt due to a municipal corporation for taxes cannot be offset by any debt due by the corporation. Thus a tax due for one year cannot be compensated by an overpayment of taxes made by the debtor the year previous. *City of New Orleans v. Davidson (La.)*, 228.

TAXATION — Continued.

Double.] See MUNICIPAL CORPORATION, 746.

Equality.] See CONSTITUTIONAL LAW, 284.

Of notes, bills, etc.] See CONSTITUTIONAL LAW, 282.

TENANCY.

By courtesy.] See MARRIAGE, 660.

TOWN.

Liability for defective highway.] See MUNICIPAL CORPORATION, 193.

TREASURER.

County, liability for moneys robbed.] See OFFICE AND OFFICER, 284.

TRIAL.

Involuntary separation of jury.] A separation of the jurors in a civil case, after the jury has retired to consider of the verdict, induced by a sudden alarm of fire in the vicinity of the jury-room, is not of itself such misconduct as will vitiate the verdict made on reassembling. *Armleder v. Lieberman* (Ohio), 530.

See CRIMINAL LAW, 31 ; CONSTITUTIONAL LAW, 84.

TRUST.

See GIFT, 446.

TRUSTEE.

Signing note as individual.] See NEGOTIABLE INSTRUMENTS, 71.

USURY.

Interest after maturity.] A promissory note was executed, payable six months after date, with interest, annually, at fifteen per cent from "due until paid." The first six months' interest was paid in advance, and after maturity many installments of interest, at fifteen per cent, were paid, usually every six months in advance, for several years. *Held*, usurious, and not within the rule allowing a rate of interest exceeding the statutory rate, after maturity, as liquidated damages for non-payment, when inserted with the sole design of securing prompt payment. *Sanner v. Smith* (Ill.), 70.

See NATIONAL BANKS, 484, 629 ; SURETY, 693.

VENDOR.

Intoxication of.] See SUNDAY, 857.

VENDOR'S LIEN.

See MARRIAGE, 655 ; VENDOR AND PURCHASER, 437.

VENDOR AND PURCHASER.

Vendor's lien — statute of limitations.] A vendor's equitable lien for unpaid purchase-money of land is not lost because the statute of limitations has barred an action on notes given therefor. *Bissell v. Nix* (Ala.), 88.

VERDICT.

Receiving in prisoner's absence.] See CRIMINAL LAW, 81.

VOLUNTARY CONVEYANCE.

Of lands held adversely.] See DEED, 52.

WAIVER.

Of exemption from execution.] See CONSTITUTIONAL LAW, 42.

Of demand and notice.] See NEGOTIABLE INSTRUMENT, 246.

Of protest.] See NEGOTIABLE INSTRUMENT, 539.

WAREHOUSEMAN.

See NEGLIGENCE, 467.

WARRANTY.

Implied.] See SALE, 694.

By indorsement.] See NEGOTIABLE INSTRUMENT, 181.

WATER AND WATER-COURSES.

1. **Obstruction of surface-water on one's own land.]** A railroad company constructed an embankment on its own land, whereby the surface-water was thrown upon the land of an adjoining owner. *Held*, that no action would lie therefor, although the company could have prevented the injury by a culvert. *Atchison, Topeka and Santa Fe Railroad Co. v. Hammer* (Kans.), 216.

2. **— overflow of water-course.]** The owner of land planted a row of trees on his own land, and along the division line between his land and that of an adjoining proprietor, the effect of which was to obstruct the passage of drift-wood carried upon the land of the adjoining proprietor, by the overflow of a water-course adjacent to the lands of both proprietors, to the injury of such adjacent land. *Held*, that no action would lie therefor. *Taylor v. Pickas* (Ind.), 114.

WHARFAGE.

See CONSTITUTIONAL LAW, 218.

WIDOW.

Neglect to dissent from husband's will.] See INSANITY, 586.

WILL.

1. **Execution — adopted subscription — acknowledgment.]** Where a will has been signed for the testator by another person in his presence and by

WILL — *Continued.*

his express direction, in the absence of the attesting witnesses, the requisite acknowledgment of the fact by the testator in the hearing of the witnesses need not be in any particular form of words, nor any specified manner, but if the witnesses are made to understand by signs, motions, conduct or attending circumstances, that the testator acknowledges the signature as his, and the instrument as his will, it is sufficient; it is not necessary that the testator should acknowledge to the attesting witnesses that such signing was in pursuance of his previous express authority and in his presence; and the fact of such signing and of such authority may be shown by the acknowledgment to the witnesses, or by other competent testimony, or may be presumed from the facts and circumstances. *Haynes v. Haynes* (Ohio), 579.

2. **Devise — subsequently-acquired lands.]** A devise of all the testator's real estate to S., and the residue of his "personal estate and possessions of whatever kind or name," does not cover land in another place, many years subsequently descending to the testator. *Blaisdell v. Hight* (Me.), 278.

3. **Precatory words — annuity — death of legatee.]** A testator provided for his wife and made her residuary legatee, adding that was his "will and desire" that she should pay his nephew \$200 annually, commencing at a specified date, until he came of age, "for the purpose of educating him." The nephew died over two years from that date, but before his majority. *Held*, that the legacy was a personal charge on his wife, but ceased with the death of the legatee. *Anderson v. Hammond* (Lea), 612.

WITNESS.

Accomplice, rights of, testifying for State.] An accomplice who is introduced as a witness and testifies to the facts within his knowledge, withholding nothing because of its tendency to self-crimination, has an equitable claim to executive clemency, or the solicitor may enter a *nolle prosequi*, but the fact does not constitute a legal defense to a prosecution against him for the same offense. *State v. Lyon* (N. C.), 518.

Of deed — purchaser — notice of incumbrance.] *See* DEED, 722.

WORDS.

"Acquittance."] *See* CRIMINAL LAW, 679.

"Laborer."] *See* CONSTITUTIONAL LAW, 503.

"Malpractice."] *See* SLANDER AND LIBEL, 389.

"Outstanding liabilities."] *See* CONTRACT, 240.

"Previous chaste character."] *See* CRIMINAL LAW, 155.

"Property."] *See* CONSTITUTIONAL LAW, 232.

"Public place."] *See* CRIMINAL LAW, 135.

"Warehouse."] *See* CRIMINAL LAW, 690.

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